DOCKET

SUPREME COURT

OF THE UNITED STATES

No. 09-837	
Title	Mayo Foundation for Medical Education and Research, et al., Petitioners v. United States
Docketed	January 14, 2010
Linked with 09A545	
Lower Ct.	United States Court of Appeals for the Eighth Circuit
Case Nos.	(07-3242, 08-2193)
Decision Date	June 12, 2009
Rehearing Denied	September 17, 2009
Questions Presented	

---Date---	---------Proceedings and Orders----------
Dec 3 2009	Application (09A545) to extend the time to file a petition for a writ of certiorari from December 16, 2009 to February 1, 2010, submitted to Justice Alito.
Dec 7 2009	Application (09A545) granted by Justice Alito extending the time to file until January 15, 2010.
Jan 14 2010	Petition for a writ of certiorari filed. (Response due February 16, 2010)
Feb 5 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioners.
Feb 12 2010	Order extending time to file response to petition to and including March 18, 2010.
Feb 16 2010	Brief amici curiae of Georgetown University, et al. filed.
Feb 16 2010	Brief amicus curiae of American Hospital Association filed.
Feb 16 2010	Brief amici curiae of Association of American Medical Colleges, et al. filed.
Feb 16 2010	Brief amicus curiae of Board of Trustees of the University of Illinois filed.
Mar 10 2010	Order further extending time to file response to petition to and including April 19, 2010.
Apr 19 2010	Brief of respondent United States in opposition filed.
May 3 2010	Reply of petitioners Mayo Foundation for Medical Education and Research, et al. filed.
May 4 2010	DISTRIBUTED for Conference of May 20, 2010.
May 24 2010	DISTRIBUTED for Conference of May 27, 2010.
Jun 1 2010	Petition GRANTED.
Jun 18 2010	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including August 6, 2010.
Jun 18 2010	The time within which to file respondent's brief on the merits is extended to and including September 27, 2010.
Jul 29 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Aug 6 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondent.
Aug 6 2010	Joint appendix filed. (Statement of costs filed)

Aug 6 2010	Brief of petitioners Mayo Foundation for Medical Education and Research, et al. filed.
Aug 13 2010	Brief amici curiae of Association of American Medical Colleges, et al. filed.
Aug 13 2010	Brief amici curiae of BJC Healthcare, et al. filed.
Aug 13 2010	Brief amicus curiae of American Hospital Association filed. (Distributed)
Aug 13 2010	Brief amicus curiae of University of Texas System filed. (Distributed)
Aug 13 2010	Brief amicus curiae of Loyola University Medical Center filed. (Distributed)
Aug 13 2010	Brief amici curiae of University of Alabama at Birmingham, et al. filed. (Distributed)
Aug 13 2010	Brief amicus curiae of Professor Carlton Smith filed. (Distributed)
Aug 16 2010	CIRCULATED.
Aug 24 2010	SET FOR ARGUMENT ON MONDAY November 8, 2010.
Sep 7 2010	Justice Kagan is recused in this case.
Sep 23 2010	Record received from U.S.C.A. for 8th Circuit. (1 box)
Sep 27 2010	Brief of respondent United States filed. (Distributed)
Oct 4 2010	Brief amicus curiae of Doctors Council S.E.I.U. filed. (Distributed)
Oct 4 2010	Brief amicus curiae of Professor Kristin E. Hickman filed. (Distributed)
Oct 4 2010	Brief amici curiae of Committee of Interns and Residents and American Medical Student Association filed.
Oct 20 2010	Record received from U.S.D.C. for the District of Minnesota (DMV) (1 (box)
Oct 27 2010	Reply of petitioners Mayo Foundation for Medical Education and Research, et al. filed. (Distributed)
Nov 8 2010	Argued. For petitioners: Theodore B. Olson, Washington, D.C. For respondent: Matthew D. Roberts, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

09-837 JAN 14 2010

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IN THE

Supreme Court of the United States

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH; MAYO CLINIC; AND REGENTS OF THE UNIVERSITY OF MINNESOTA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Treasury Department can categorically exclude all medical residents and other full-time employees from the definition of "student" in 26 U.S.C. § 3121(b)(10), which exempts from Social Security taxes "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceedings below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Mayo Foundation for Medical Education and Research ("Mayo Foundation") and Mayo Clinic are both nonprofit corporations, that the sole member of Mayo Foundation is Mayo Clinic, and that no publicly held company owns 10% or more of the stock of either Mayo Foundation or Mayo Clinic. The University of Minnesota is a public institution of higher education established by the Constitution of the State of Minnesota.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Mayo Foundation for Medical Education and Research and Mayo Clinic ("Mayo"), and petitioner Regents of the University of Minnesota ("University"), respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 568 F.3d 675. Pet. App. 1a. The order denying the petition for rehearing and rehearing en banc is unreported. *Id.* at 66a. The opinion of the United States District Court for the District of Minnesota in *Mayo Foundation for Medical Education & Research v. United States* is reported at 503 F. Supp. 2d 1164. *Id.* at 20a. The opinion of the district court in *Regents of the University of Minnesota v. United States* is unpublished but is electronically reported at 2008 WL 906799. *Id.* at 47a.

JURISDICTION

The court of appeals filed its opinion on June 12, 2009. It denied petitioners' timely petition for rehearing and rehearing en banc on September 17, 2009. On December 7, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 15, 2010. No. 09A545. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Internal Revenue Code and the Treasury Department's implementing regulations are set forth in the appendix to this petition.

STATEMENT

The circuits are irreconcilably divided on the question whether medical residents can be categorically excluded from the Student Exemption to the Federal Insurance Contribution Act ("FICA"). That provision exempts from Social Security taxes all compensation for "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10). According to the government—and to the Eighth Circuit in the decision below—medical residents who are enrolled and regularly attending classes at a school can be categorically excluded from the Student Exemption because they work more than forty hours per week. Pet. App. 18a-19a. Four other circuits disagree, creating intolerable disuniformity on a question that the government itself describes as "an issue of great administrative and fiscal importance, involving, for medical residents nationwide, at least $2.1 billion in pending refund claims and an estimated $700 million per year in taxes." Br. of the United States at i, Regents of Univ. of Minn. v. United States (8th Cir. filed Sept. 2, 2008) (No. 08-2193).

This circuit split arose as a direct result of the Treasury Department's effort to overturn a series of judicial decisions holding that medical residents are eligible for the Student Exemption. Although it dis-

agreed with those decisions, the Treasury Department declined to seek an amendment of the statute from Congress; it instead promulgated a regulation that purports to narrow the scope of the Student Exemption by excluding all full-time employees—including medical residents—even where those employees meet the statutory criteria for "student" status. Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii).

In the decision below, the Eighth Circuit upheld the Treasury Department's full-time employee regulation. In so doing, the court of appeals acknowledged that "four of [its] sister circuits have recently declared . . . that the student exception statute is unambiguous" and can include medical residents; the Eighth Circuit nevertheless concluded that those circuits' "interpretation of [the Student Exemption] . . . cannot be correct." Pet. App. 9a-10a.

This Court's review of that decision is warranted to resolve this direct and acknowledged circuit split on a question that implicates billions of dollars in tax liability, to provide the Nation's 8,000 medical residency programs and 100,000 medical residents with authoritative guidance regarding their tax obligations, and to reject the Treasury Department's arbitrary and unreasonable attempt to narrow the Student Exemption.

1. To fund the Social Security system, FICA imposes a payroll tax on "wages" that is assessed on both employers and employees. 26 U.S.C. §§ 3101, 3111. FICA defines "wages" as "remuneration for employment" (*id.* § 3121(b)), but excludes from the definition of "employment" "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes

at such school, college, or university." *Id.* § 3121(b)(10).

Congress enacted this Student Exemption provision in 1939. A year later, the Treasury Department adopted regulations that stated that "student" status shall be determined "on the basis of the relationship of such employee with the organization for which the services are performed" and that an employee who performs services "as an incident to and for the purpose of pursuing a course of study" is a "student" within the meaning of the Student Exemption. Treas. Reg. § 31.3121(b)(10)-2(c) (2004). That regulation, which remained substantially unchanged for the next six decades, permitted medical residents to qualify for the Student Exemption even if they worked more than forty hours per week. Pet. App. 42a & n.12.

2. Petitioners sponsor medical residency programs that educate recent medical school graduates through a combination of classroom instruction, reading assignments, and hands-on patient care. Pet. App. 22a, 38a n.8, 63a. Medical residency programs generally last between three and five years; upon completion of the program, residents become eligible to sit for a specialty board examination. U.S. C.A. App. 300 (No. 08-2193).

Petitioners' medical residency programs are accredited by the Accreditation Council on Graduate Medical Education. Pet. App. 22a; U.S. C.A. App. 300 (No. 08-2193). Like other students, medical residents register for specific courses (called "rotations"), attend lectures, take written examinations, and can choose to pursue electives, to spend time researching academic topics, and to participate in journal clubs. Pet. App. 22a, 41a n.10, 63a. They

also spend, on average, forty or more hours per week caring for patients under the supervision of attending physicians, who evaluate the residents' performance in the program. *Id.* at 19a, 48a-49a. While on patient rounds, the residents and attending physicians move from patient to patient, and the attending physicians conduct didactic sessions with the residents that draw out the salient educational points of each patient's condition. *United States v. Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 1003 (D. Minn. 2003) ("*Mayo I*").

Medical residency programs do not exist to provide hospitals with services. Pet. App. 64a-65a. Indeed, hospitals "could provide patient care far more cost-efficiently *without* residents because of the time and effort required to supervise and teach them." *Mayo I*, 282 F. Supp. 2d at 1014 (emphasis in original). All the residents' hands-on patient care is designed to be educational; to that end, petitioners "ensure that" nurses and other "allied healthcare personnel perform ancillary procedures that have no 'educational value,' such as drawing blood [and] starting IVs." *Id.* at 1015.

To cover cost-of-living expenses, petitioners pay their medical residents an annual stipend of between approximately $40,000 and $60,000, depending on experience. Pet. App. 17a.

3. In 1990, the Social Security Administration—adopting the position that medical residents are categorically ineligible for the Student Exemption—issued a formal notice of assessment to the University for unpaid Social Security taxes on its medical residents' stipends. *See Minnesota v. Apfel*, 151 F.3d 742, 743 (8th Cir. 1998). The Eighth Circuit overturned that assessment, holding that stipends paid

to medical residents at the University were exempt from Social Security taxes because the residents qualified for the Social Security Act's Student Exemption (42 U.S.C. § 410(a)(10)), which is identical to FICA's Student Exemption. *Apfel*, 151 F.3d at 748. That exception applied, the court explained, because "the primary purpose for the residents' participation in the program is to pursue a course of study rather than to earn a livelihood." *Id.*[1]

Several years later, the District of Minnesota held that Mayo's medical residents were also exempt from Social Security taxes. *Mayo I*, 282 F. Supp. 2d at 1018. Rejecting the government's argument that medical residents' long hours categorically disqualified them from the Student Exemption, the district court held that "[t]ime alone cannot be the sole measure of the relationship between services performed and a course of study." *Id.* The court concluded that, in contrast to the government's categorical approach, medical residents' eligibility for the Student Exemption depends on a "fact-specific, case-by-case examination" of whether the residents satisfy the criteria set forth in the Exemption. *Id.* at 1007. In the case of Mayo's medical residents, the court

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[1] For the tax periods at issue in *Apfel*, the University's status as a state entity meant that it was covered under a Social Security coverage agreement between the State of Minnesota and the federal government. Accordingly, the Eighth Circuit held both that medical residents were not "employees" under the coverage agreement and that, even if medical residents were "employees," they were statutorily excluded from coverage under the Social Security Act's Student Exemption. 26 U.S.C. § 3121(b)(10). In 1987, Social Security taxation of state employees was transferred to the FICA provisions of the Internal Revenue Code. Pub. L. No. 99-509, § 9002(b)(1)(A), 100 Stat. 1874, 1971-72 (1986).

found that the educational purpose of their patient care predominated over its service aspect and that they were accordingly covered by the Student Exemption. *Id.* at 1018. The government filed a notice of appeal to the Eighth Circuit but subsequently dismissed that appeal.

Less than two months later, the Treasury Department attempted to create through the regulatory process what it had repeatedly failed to secure in court and had refused to seek from Congress: a categorical exclusion of medical residents and all other full-time employees from the Student Exemption. Explicitly acknowledging its desire to overturn the decisions holding that medical residents at Mayo and the University are students and therefore exempt from Social Security taxes, the Treasury Department promulgated amendments to its regulations interpreting the Student Exemption. Student FICA Exception, 69 Fed. Reg. 76,404 (Dec. 21, 2004); *see also* Reply Br. of the United States at 9, *Regents of Univ. of Minn.* (filed Oct. 9, 2008) (No. 08-2193) ("the regulation was amended partly in response to the recent wave of litigation concerning the status of medical residents as 'students'").

One of the new regulations categorically excludes "full-time employees" from the Student Exemption. Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii). According to the full-time employee regulation, an employee whose "normal work schedule" is at least 40 hours per week is a full-time employee and "[t]he determination of an employee's normal work schedule is not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect." *Id.* As a specific example of a full-time employee, the regulation lists a medical resident whose "normal work schedule, which in-

cludes services having an educational, instructional, or training aspect, is 40 hours or more per week." *Id.* § 31.3121(b)(10)-2(e), Ex. 4.

4. Mayo and the University filed separate tax refund actions in the District of Minnesota that challenged the Treasury Department's attempt to use the full-time employee regulation to categorically exclude their medical residents from the Student Exemption. The district court invalidated that regulation.

In Mayo's suit, the district court concluded "that the term 'student' is not ambiguous" because it "is well defined and commonly understood outside the context of the Student Exclusion." Pet. App. 39a. It found the government's contrary position to be "quite puzzling" because, "in *Mayo I*, this Court expressly determined that the Student Exclusion was not ambiguous and cited to an extensive factual record as to . . . why medical residents qualify for the 'student' exclusion from FICA taxation." *Id.* at 31a n.3 (citing *Mayo I*, 282 F. Supp. 2d at 1007, 1013-18). The district court explained that the "full-time employee exception arbitrarily narrows [the ordinary definition of 'student'] by providing that a 'full-time' employee is not a 'student' even if the educational aspect of an employee's service predominates over the service aspect." *Id.* at 40a.

The district court applied that holding in the University's suit, and concluded that medical residents at the University, like those at Mayo, are "students" within the meaning of the Student Exemption. Pet. App. 65a.

5. The Eighth Circuit heard the government's appeals together and reversed in a single opinion. Acknowledging that the case presented a "difficult issue," the court of appeals held that the full-time

employee regulation is valid under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because the term "student" is ambiguous and the full-time employee regulation is a reasonable interpretation of the statutory Student Exemption. Pet. App. 12a, 18a. In so holding, the panel expressly acknowledged that "four of our sister circuits have recently declared, in cases arising under the former regulations, that the student exception statute is unambiguous" and can include medical residents enrolled in medical residency programs and regularly attending classes. *Id.* at 9a (citing *United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27 (2d Cir. 2009); *United States v. Detroit Med. Ctr.*, 557 F.3d 412, 417-18 (6th Cir. 2009); *Univ. of Chi. Hosps. v. United States*, 545 F.3d 564, 567 (7th Cir. 2008); *United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1251-56 (11th Cir. 2007)). The Eighth Circuit conceded that, "[i]f that interpretation of the statute is correct, we must affirm." *Id.*

The Eighth Circuit nevertheless expressly rejected the decisions of the Second, Sixth, Seventh, and Eleventh Circuits. Pet. App. 10a. According to the Eighth Circuit, those courts' "interpretation of [the Student Exemption] . . . cannot be correct" because the Student Exemption is ambiguous and can reasonably be construed as categorically excluding all full-time employees, including medical residents. *Id.* "[W]hen the context is a provision of the Internal Revenue Code," the court asserted, "a Treasury Regulation interpreting the words is nearly always appropriate." *Id.* at 12a.

The Eighth Circuit denied rehearing en banc over the dissents of Judge Melloy and Judge Shepherd. Pet. App. 67a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's holding that the statutory term "student" in FICA's Student Exemption is ambiguous and can be narrowed by the Treasury Department to categorically exclude all medical residents and other full-time employees directly conflicts with the decisions of four other circuits. *See, e.g.*, *United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27 (2d Cir. 2009); *United States v. Detroit Med. Ctr.*, 557 F.3d 412, 417-18 (6th Cir. 2009). The Eighth Circuit itself acknowledged that the Second, Sixth, Seventh, and Eleventh Circuits have each held that the Student Exemption *unambiguously* encompasses medical residents who otherwise satisfy the Exemption's statutory criteria. Pet. App. 9a. The Eighth Circuit nevertheless upheld the full-time employee regulation because it concluded that those circuits' interpretation of the Student Exemption "cannot be correct." *Id.* at 10a.

As a result of this conflict, medical residency programs and their residents are liable for Social Security taxes in the Eighth Circuit, are exempt from those taxes in the Second, Sixth, Seventh, and Eleventh Circuits (if the residents otherwise satisfy the Student Exemption's statutory requirements), and are left in a state of uncertainty regarding their tax obligations in other circuits. Only this Court can authoritatively resolve this frequently recurring question that has generated what the Eighth Circuit described as an "avalanche" of costly and protracted litigation. Pet. App. 3a.

The Eighth Circuit's holding also conflicts with this Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The statutory term "student" unambiguously

encompasses medical residents who are enrolled in a residency program sponsored by a school, college, or university and who are pursuing their medical training through a curriculum that includes classroom instruction, reading assignments, and hands-on patient care. The Eighth Circuit's reasoning that an otherwise commonly understood term is presumed to be ambiguous when used in a tax statute effectively nullifies the first step of *Chevron* analysis in tax cases and conflicts with numerous decisions of this Court invalidating tax regulations as contrary to the plain language of a statute. *See, e.g., Rowan Cos. v. United States*, 452 U.S. 247, 263 (1981). Moreover, even if the Student Exemption were ambiguous, it would be arbitrary and unreasonable for the Treasury Department to categorically exclude all full-time employees from the definition of "student" without regard to whether those employees are pursuing a course of study through their employment.

The staggering financial implications of the Eighth Circuit's decision underscore the need for this Court's review. As the government itself has acknowledged, the question of the Student Exemption's application to medical residents involves billions of dollars in pending refund claims and hundreds of millions of dollars per year in taxes. Br. of the United States at i, *Regents of Univ. of Minn.* (No. 08-2193). This Court should grant certiorari to resolve the irreconcilable circuit split on this question of exceptional importance to the Nation's medical residency programs and medical residents.

I. The Decision Below Conflicts With The Decisions Of Four Other Circuits.

This Court's review is warranted because the Eighth Circuit's holding that medical residents can be categorically excluded from FICA's Student Exemption directly conflicts with the decisions of four other circuits and creates intolerable disuniformity and uncertainty on a tax issue that should be governed by a single, nationwide standard.

A. The Second, Sixth, Seventh, and Eleventh Circuits have all held that the Student Exemption unambiguously includes medical residents who are enrolled in and regularly attending classes at a school, college, or university—even if they spend more than forty hours per week providing patient care.

In *United States v. Mount Sinai Medical Center of Florida, Inc.*, 486 F.3d 1248 (11th Cir. 2007), the Eleventh Circuit squarely held that "the statutory language of [FICA's Student Exemption] is not ambiguous" and that, under the plain statutory language, "the services performed by medical residents are not categorically ineligible for the student exemption from FICA taxation." *Id.* at 1249-50, 1251. "Whether a medical resident is a 'student,'" the Eleventh Circuit explained, "depend[s] on the nature of the residency program" and a "case-by-case analysis" of whether the program's medical residents satisfy the Student Exemption's statutory criteria. *Id.* at 1252, 1253. Declining "to create an ambiguity where there is none," the court explicitly "reject[ed] the government's assertion that courts should defer to a 'bright-line' rule that medical residents can never be exempted from FICA taxation as students." *Id.* at 1252, 1253. "If Congress had wanted to make medi-

cal residents ineligible for the student exemption," the Eleventh Circuit concluded, "it could have easily crafted a specific exclusion." *Id.* at 1252.

The Seventh Circuit reached the same conclusion in *University of Chicago Hospitals v. United States*, 545 F.3d 564 (7th Cir. 2008), where it held that "there is nothing in [FICA's Student Exemption] itself that categorically excludes medical residents from eligibility for the student exception." *Id.* at 567. The Seventh Circuit explained that the "student exception unambiguously does *not* categorically exclude medical residents as 'students' potentially eligible for exemption from payment of FICA taxes," and labeled the interpretation advanced by the government—"that the student exception is categorically inapplicable to residents"—"textually untenable." *Id.* at 565, 567 (emphasis in original). In contrast with the government's categorical approach, the Seventh Circuit endorsed "a case-by-case analysis . . . to determine whether medical residents qualify for the statutory exemption from FICA taxation." *Id.* at 570.

Similarly, in *United States v. Detroit Medical Center*, 557 F.3d 412 (6th Cir. 2009), the Sixth Circuit rejected the government's argument "that as a per se matter a resident can never be a student" within the meaning of the Student Exemption. *Id.* at 418. Like the Seventh and Eleventh Circuits, the Sixth Circuit held that the Student Exemption instead mandates a case-by-case approach and that, "[t]o determine whether the doctors in . . . [a] residency program are students, we thus need to know what the residents in the program do and under what circumstances." *Id.* at 417-18.

Finally, in *United States v. Memorial Sloan-Kettering Cancer Center*, 563 F.3d 19 (2d Cir. 2009),

the Second Circuit "agree[d] with the Sixth, Seventh, and Eleventh Circuits that the [Student Exemption] is unambiguous and that whether medical residents are 'students' . . . is a question of fact, not a question of law." *Id.* at 27. Quoting the Seventh Circuit, the court held that the Student Exemption "'unambiguously does not categorically exclude medical residents from eligibility for the student exception.'" *Id.* at 28 (quoting *Univ. of Chi. Hosps.*, 545 F.3d at 570). Indeed, the Second Circuit emphasized in at least five places throughout its opinion that the Student Exemption unambiguously encompasses medical residents who satisfy the statutory eligibility requirements. *See, e.g.*, *id.* ("the student exception is unambiguous"); *id.* ("we find the statute unambiguous").

B. The Eighth Circuit's holding in the decision below directly conflicts with the holdings of the Second, Sixth, Seventh, and Eleventh Circuits. Acknowledging that "four of [its] sister circuits have recently declared . . . that the student exception statute is unambiguous" and can include medical residents enrolled in medical residency programs and regularly attending classes, the Eighth Circuit declared that those decisions "cannot be correct." Pet. App. 9a-10a. According to the Eighth Circuit, the full-time employee regulation's categorical exclusion of all medical residents "is a permissible interpretation of the statutory student exception" because words (like "student") that have a "common or plain meaning in other contexts" are nearly always ambiguous "when the context is a provision of the Internal Revenue Code." *Id.* at 10a, 18a. Having identified a purported ambiguity in the text of the Student Exemption, the Eighth Circuit concluded that the narrow interpretation of "student" in the full-time em-

ployee regulation is reasonable because it allegedly "harmonizes . . . with the plain language of the statute" and is consistent with Congress's legislative objectives. *Id.* at 13a (internal quotation marks omitted).[2]

The government itself has acknowledged the existence of this conflict between the decisions of the four circuits that have held the Student Exemption to be unambiguous, and the Eighth Circuit's holding that the Student Exemption is ambiguous and can reasonably be interpreted to categorically exclude all medical residents. *See* Br. of the United States at 42, *Regents of Univ. of Minn.* (No. 08-2193) ("[t]he taxpayer's position (that residents are not *per se* ineligible, but that the question depends on the facts and circumstances to be established at trial) has been accepted not only by the court in *Mayo I* (which

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[2] While conceding that it would be required to "affirm" the district court's decisions "[i]f th[e] interpretation of the" Student Exemption adopted by the Second, Sixth, Seventh, and Eleventh Circuits "is correct" (Pet. App. 9a), the Eighth Circuit also cryptically suggested in a footnote that those decisions were distinguishable because they "did not address the validity of the amended regulations, which in [its] view raises an entirely different issue." *Id.* at 9a n.2. The Eighth Circuit's effort to distinguish the four prior circuit court decisions is ineffectual because each of those decisions held that the language of the Student Exemption is *unambiguous* and cannot be narrowed to categorically exclude medical residents. *See, e.g., Univ. of Chi. Hosps.*, 545 F.3d at 565; *Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 28. As the Eighth Circuit recognized in other parts of its opinion, that reasoning compels invalidation of the full-time employee regulation (and conflicts with the Eighth Circuit's decision upholding that provision) because the regulation arbitrarily and unreasonably excludes all medical residents and other full-time employees from the unambiguous scope of the Student Exemption. Pet. App. 9a-10a.

tried the case to conclusion), but in decisions reserving the matter for trial," including "*United States v. Mt. Sinai Med. Ctr. of Fla.*, 486 F.3d 1248 (11th Cir. 2007)").

In light of this irreconcilable conflict, medical residency programs and their residents in different parts of the country are subject to different Social Security tax obligations. In the Eighth Circuit, all medical residency programs and their residents are obligated to pay Social Security taxes. In contrast, in the Second, Sixth, Seventh, and Eleventh Circuits, medical residency programs and their residents are exempt from Social Security taxes under the Student Exemption as long as the residents are enrolled in and regularly attending classes at a school, college, or university. And, in the remaining circuits, medical residency programs and their residents are left in a state of uncertainty regarding the rule of law that will be used to evaluate their Social Security tax obligations.

The imposition of such divergent tax burdens on similarly situated taxpayers is flatly at odds with the "uniformity" that is a "cardinal principle" of the federal "tax scheme." *United States v. Gilbert Assocs., Inc.*, 345 U.S. 361, 364 (1953); *see also United States v. Lee*, 455 U.S. 252, 261 (1982). This Court's review is necessary to restore that "uniformity" by establishing a single, nationally applicable rule of law for determining whether medical residents and other full-time employees are eligible for the Student Exemption.

II. The Decision Below Conflicts With This Court's Precedent.

The extraordinary level of deference that the Eighth Circuit afforded to the Treasury Department's full-time employee regulation also conflicts with this Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That decision requires courts reviewing agency regulations to determine first whether "Congress has directly spoken to the precise question at issue" and, then, if the relevant statute is found to be ambiguous, to determine whether the agency's interpretation of the statute is reasonable. *Id.* at 842. The Eighth Circuit's decision misapplies both steps of the *Chevron* framework.

The Eighth Circuit's holding that the term "student" in FICA's Student Exemption is ambiguous disregards the statute's plain language. The text of the Student Exemption is clear and unequivocal: It exempts from Social Security taxation all compensation for "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10). As the Second, Sixth, Seventh, and Eleventh Circuits have held, the term "student" in the Student Exemption is not ambiguous. *See Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 27; *Detroit Med. Ctr.*, 557 F.3d at 417-18; *Univ. of Chi. Hosps.*, 545 F.3d at 567; *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d at 1251-56. Rather, "student" is a "common word . . . intended to have its usual and ordinary meaning of a person pursuing studies at an appropriate institution." *Detroit Med. Ctr.*, 557 F.3d at 417-18; *see also Webster's New International Dictionary* 2502 (2d ed. 1954) (a "student" is a "person engaged in study . . .

esp[ecially], one who attends a school"); *Oxford Universal Dictionary* 2049-50 (3d ed. 1955) (a "student" engages in "study" by applying the mind "to the acquisition of learning, whether by means of books, observation, or experiment").

Medical residents who are enrolled in a school, college, or university and furthering their medical training by following a curriculum of classroom lectures, reading assignments, and hands-on patient care are unambiguously "students" within the meaning of the Student Exemption because they are engaged in a course of study that provides them with the skills and knowledge necessary to pursue their chosen profession.

The Eighth Circuit, however, held that a term in a tax statute is almost always ambiguous, even when the term has "a common or plain meaning in other contexts." Pet. App. 10a. The Eighth Circuit's extreme level of deference to tax regulations and refusal to adhere to the plain statutory language used by Congress effectively eliminates the first step of *Chevron* analysis in tax cases. It also squarely conflicts with the numerous decisions in which this Court has invalidated tax regulations that it held to be contrary to plain statutory language. *See Rowan Cos. v. United States*, 452 U.S. 247, 263 (1981) (invalidating Treasury Department regulations that conflicted with the "plain language" of the controlling tax statutes); *Maass v. Higgins*, 312 U.S. 443, 447 (1941) (invalidating the Treasury Department's estate tax regulation because it "is an unwarranted extension of the plain meaning of the statute and cannot, therefore, be sustained").

Moreover, even if the Second, Sixth, Seventh, and Eleventh Circuits were wrong when they con-

cluded that the Student Exemption is unambiguous, the Eighth Circuit nevertheless misapplied *Chevron*'s second step because the Treasury Department's full-time employee regulation is an unreasonable interpretation of the statute. The regulation provides that, when determining "student" status, the educational aspect of an employee's service must automatically be disregarded when the employee works more than forty hours per week. The result is an arbitrary bright-line rule that gives controlling weight to the number of hours worked by a full-time employee even when all the work performed by the employee is for educational purposes. But the fact that medical residents spend long hours developing their medical abilities through hands-on patient care does not detract from the fact that they are engaged in a course of study to expand their knowledge and hone their skills. As the Second, Sixth, Seventh, and Eleventh Circuits have recognized, the "student" status of medical residents should not turn upon the number of hours they devote to patient care but instead on "what the residents in the program do and under what circumstances." *Detroit Med. Ctr.*, 557 F.3d at 417-18. The Treasury Department's categorical exclusion of all medical residents and other full-time employees is arbitrary and unreasonable, and should be rejected by this Court.

III. The Eighth Circuit's Erroneous Interpretation Of The Student Exemption Raises Issues Of Exceptional Importance To Medical Residency Programs And Their Residents.

This Court should grant review and authoritatively interpret the scope of FICA's Student Exemp-

tion because that question has far-reaching implications for the Nation's 8,000 residency programs and 100,000 medical residents.

The question of the Student Exemption's application to medical residents "is an issue of great administrative and fiscal importance, involving, for medical residents nationwide, at least $2.1 billion in pending refund claims and an estimated $700 million per year in taxes." Br. of the United States at i, *Regents of Univ. of Minn.* (No. 08-2193). It should come as no surprise, then, that litigation on this issue has "exploded across the country" and that medical residency programs and their residents have "fil[ed] . . . more than 7,000 claims with the IRS." Pet. App. 3a, 4a. There is no uniform rule of law, however, to apply to these pending refund claims. As a result of the Eighth Circuit's arbitrary and unreasonable interpretation of the Student Exemption, medical residency programs and their residents in the Eighth Circuit are subject to tens of millions of dollars in annual Social Security tax obligations that Congress never intended to impose and that similarly situated taxpayers in the Second, Sixth, Seventh, and Eleventh Circuits are not required to pay.

In fact, the implications of the Eighth Circuit's decision extend well beyond medical residency programs and medical residents. As the Eighth Circuit acknowledged, "the amended regulations" promulgated by the Treasury Department in 2005 apply to *all* full-time employees and therefore "cover a broad[ ] range of issues" in addition to the application of the Student Exemption to medical residents. Pet. App. 6a. According to the Treasury Department, the question whether full-time employees are categorically ineligible for the Student Exemption "also applies to services performed by employees in other

fields, particularly regulated fields, where on the job training is often required to gain licensure." Student FICA Exception, 69 Fed. Reg. 8604, 8605 (Feb. 25, 2004). The issue therefore "has significant social security benefits and FICA tax implications" for employers and employees outside the medical residency setting. *Id.*

In light of the "significant . . . tax implications" of this frequently recurring issue—and the direct and acknowledged conflict that it has generated among the circuits—there are compelling reasons for this Court to grant review. *See Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) ("enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari") (Scalia, J., concurring in denial of certiorari).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Mayo Foundation for Medical Education and Research; Mayo Clinic, Plaintiffs-Appellees,

v.

United States of America, Defendant-Appellant.

Regents of the University of Minnesota, Plaintiff-Appellee,

v.

United States of America, Defendant-Appellant.

Nos. 07-3242, 08-2193.

Submitted: Oct. 16, 2008.

Filed: June 12, 2009.

Teresa E. McLaughlin, argued, Bridget M. Rowan, on the brief, Dept. of Justice, Washington DC, for appellant.

Thomas Tinkham, argued, John W. Windhorst Jr., William R. Goetz, Christopher R. Duggan, on the brief, Minneapolis, MN, for appellee.

Before LOKEN, Chief Judge, BYE and SMITH, Circuit Judges.

LOKEN, Chief Judge.

"Residents" participating in accredited graduate medical education programs receive substantial payments (called stipends) from the Mayo Foundation for Medical Education and Research ("Mayo") and the University of Minnesota (the "University") for medical and patient care services provided by the residents at affiliated and unaffiliated hospitals and clinics. The difficult issue in these cases is whether these payments qualify for the student exception to Federal Insurance Contributions Act ("FICA") taxes imposed on employers and employees. *See* 26 U.S.C. § 3121(b)(10). The district court answered this question affirmatively, declaring invalid recently promulgated Treasury Regulations to the contrary and awarding Mayo and the University refunds of substantial FICA taxes paid during the second quarter of 2005. *Mayo Found. for Med. Educ. & Research v. United States*, 503 F.Supp.2d 1164 (D. Minn. 2007); *Regents of the Univ. of Minn. v. United States*, 2008 WL 906799 (D. Minn. Apr. 1, 2008). The United States appeals. We review the district court's invalidation of Treasury Regulations *de novo*. *Walshire v. United States*, 288 F.3d 342, 345 (8th Cir. 2002). Concluding that we must defer to the regulation limiting this exception to students who are not full-time employees because it is a permissible interpretation of the statute, we reverse.

I.

FICA taxes, which support the Social Security system, are imposed on both employers and employees based upon wages paid. 26 U.S.C. §§ 3101, 3111. The term "wages" is broadly defined in § 3121(a) as "all remuneration for employment." "Employment" is also broadly defined in § 3121(b) as "any service, of whatever nature, performed . . . by an employee," but there are twenty-one specific statutory exceptions. At issue here is the exception for "service performed in the employ of . . . a school, college, or university . . . if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10).

A student exception has been part of the FICA and Social Security statutes since 1939. Although litigation regarding its application to medical school stipends paid to enrolled residents arose only recently, it has now exploded across the country. The avalanche began when Minnesota sued the Commissioner of Social Security to recover assessments for stipends paid to the University's medical residents under a "Section 218 Agreement," the mechanism by which States such as Minnesota then obtained Social Security coverage for designated employees. The district court ruled for the State on two alternative grounds, and we affirmed. *Minnesota v. Chater*, 1997 WL 33352908 (D. Minn. May 21, 1997), *aff'd*, *Minnesota v. Apfel*, 151 F.3d 742 (8th Cir. 1998). The first ground, that the State did not intend to designate medical residents under the Agreement, is of no relevance here. But the alternative ground, that medical resident services fell within the student exception in the Social Security Act, 42 U.S.C. §§ 410(a)(7)(A),

418(c)(5), prompted the filing of more than 7,000 claims with the IRS, as medical schools sought refunds of FICA taxes on medical resident "wages," based on the student exception in 26 U.S.C. § 3121(b)(10).[1]

One refund claim was filed by Mayo. The IRS paid the refund, sued to recover it, and Mayo counterclaimed for refunds in other years. At that time, as one familiar with federal tax law would expect, there was a lengthy Treasury Regulation interpreting the student exception statute, which provided in relevant part:

> (b) For purposes of this exception, the amount of remuneration for services performed . . . the type of services performed . . . and the place where the services are performed are immaterial. The statutory tests are
>
> > (1) the character of the organization . . . as a school, college, or university . . . and (2) the status of the employee as a student enrolled and regularly attending classes at the school, college, or university by which he is employed. . . .
> >
> > (c) . . . An employee who performs services in the employ of a school, college, or university, *as an incident to and for the purpose of pursuing a course of study at such school*, college, or university has the status of

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[1] In 1987, Social Security taxation of state employees such as the University's residents was transferred to the FICA provisions of the Internal Revenue Code. *See* Pub. L. No. 99-509, sec 9002(b), 100 Stat. 1874, 1971-72 (1986).

> a student in the performance of such services. . . .
>
> (d) The term "school, college, or university" . . . is to be taken in its commonly or generally accepted sense.

Treas. Reg. (26 C.F.R.) § 31.3121(b)(10)-2(b)-(d) (2004) (emphasis added).

After a bench trial, the district court granted judgment in favor of Mayo. Relying on our decision in *Apfel* that the Social Security Act regulations required a fact-specific, "case-by-case examination," 151 F.3d at 748, and applying the above quoted portions of the Treasury Regulations, the court found that Mayo was the employer of its medical residents; that Mayo is a school, college, or university; that the residents were "students" enrolled in a residency program and regularly attending classes; and that "the patient care services provided by residents in the [Mayo] residency programs were incidental to and for the purpose of pursuing a course of study in postgraduate medical education." *United States v. Mayo Found. for Med. Educ. & Research*, 282 F.Supp.2d 997, 1011-18 (D. Minn. 2003) (*Mayo I*).

The government appealed this decision but then dismissed the appeal and published notice of proposed regulations amending Treas. Reg. § 31.3121(b)(10)-2. 69 Fed. Reg. 8604 (Feb. 25, 2004). After extensive public comments and a hearing, the IRS promulgated final amended regulations, effective April 1, 2005. T.D. 9167, 2005-1 C.B. 261, 69 Fed. Reg. 76404 (Dec. 21, 2004). As relevant here, the amended regulations provide, with the amendments at issue highlighted:

> (b) . . . The statutory tests are:

> (1) The character of the organization . . . as a school, college, or university *within the meaning of paragraph (c) of this section* . . . and
>
> (2) The status of the employee as a student enrolled and regularly attending classes *within the meaning of paragraph (d)* . . . .
>
> (c) . . . *An organization is a school, college, or university within the meaning of section 3121(b)(10) if its primary function is the presentation of formal instruction. . . . See section 170(b)(1)(A)(ii) and the regulations thereunder.*
>
> (d) . . . In order to have the status of a student . . . the employee's services must be incident to and for the purpose of pursuing a course of study *within the meaning of paragraph (d)(3) of this section. . . .*
>
> [(d)(3)](iii) . . . The services of a full-time employee are not incident to and for the purpose of pursuing a course of study. . . . [R]egardless of the employer's classification of the employee, an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee. . . . The determination of an employee's normal work schedule is not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect.

Though the amended regulations cover a broader range of issues, the "Need for Regulations" section of the notice of proposed rulemaking expressly focused on medical residents and the decisions in *Apfel* and

Mayo I. *See* 69 Fed. Reg. at 8605. The final regulations include as an example of services *not* excepted under 26 U.S.C. § 3121(b)(10) a person employed by a university to provide patient care services at an affiliated teaching hospital if the employee works at least forty hours per week, even if the services have an educational or training aspect. Such services are not excluded, the regulations explain, because the person is a full time employee and therefore his services "are not incident to and for the purpose of pursuing a course of study." Treas. Reg. § 31.3121(b)(10)-2(c), Example 4.

The amended regulations apply to the calendar quarters here at issue, but the district court held them invalid. In Mayo's case, decided first, the court concluded:

> (i) the "primary function" test in Treas. Reg. 31.3121(b)(10)-2(c) "is inconsistent with the plain meaning of [the term 'school, college, or university' in] the statute and is invalid."
>
> (ii) "the full-time employee exception [in Treas. Reg. 31.3121(b)(10)-2(d)(3)] is invalid because it is inconsistent with the plain meaning of the statute and is arbitrary, capricious, and unreasonable" because the term student, like the term school, college, or university, "is not ambiguous."

503 F.Supp.2d at 1171-77. Eight months later, the court granted summary judgment in favor of the University. The court adopted its ruling in Mayo's case that the amended regulations are invalid, applied the prior regulations, and concluded that the University's medical residents (i) are employed by the University, not by the independent hospitals

where they provide patient care services, (ii) are "enrolled" and "regularly attending classes" in a residency program, and (iii) provide patient care services that are "incident to and for the purpose of pursuing a course of study."

The government appeals both decisions, arguing that the amended regulations are valid and challenging the grant of summary judgment to the University on the employer issue. We assigned both appeals to the same panel, which heard oral arguments the same day. We resolve both appeals in a single opinion because a single common issue is controlling. We will focus first on that issue, the validity of the full-time employee limitation in 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii).

II.

Treasury Regulations interpreting the Internal Revenue Code are entitled to substantial deference. *Boeing Co. v. United States*, 537 U.S. 437, 448, 123 S.Ct. 1099, 155 L.Ed.2d 17 (2003). But in reviewing an agency's interpretation of a statute, the first question is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). If it has, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S.Ct. 2778. On the other hand, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778.

A. In these cases, the district court invalidated the "primary function" and "full-time employee"

provisions in the amended regulations as contrary to the plain meaning of an unambiguous statute. Likewise, four of our sister circuits have recently declared, in cases arising under the former regulations, that the student exception statute is unambiguous and "does not limit the types of services that qualify for the exemption." *United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1251-53 (11th Cir. 2007); *accord United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27 (2d. Cir. 2009); *United States v. Detroit Med. Ctr.* 557 F.3d 412, 417-18 (6th Cir. 2009); *Univ. of Chi. Hosps. v. United States*, 545 F.3d 564, 567 (7th Cir. 2008).[2] In other words, these courts reasoned, because judges know what is a "school" and who is a "student" and what it means to be "enrolled and regularly attending classes," a Treasury Regulation interpreting these common terms is invalid. If that interpretation of the statute is correct, we must affirm in *Mayo* and turn to the remaining question whether the University is the "employer" of its medical residents. *See generally Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-83, 125 S.Ct. 2688, 162

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[2] Viewed narrowly, these circuit court decisions held only that the statute *as construed in the prior regulations* precluded the government's contention that payments to medical residents are *categorically* ineligible for the student exception. We do not quarrel with that holding, which is consistent with *Apfel* and *Mayo I*. But those courts did not address the validity of the amended regulations, which in our view raises an entirely different issue under accepted administrative law principles.

L.Ed.2d 820 (majority op.), and 1016-19, 125 S.Ct. 2688 (Scalia, J., dissenting) (2005).

But this interpretation of 26 U.S.C. § 3121(b)(10), part of the Internal Revenue Code, cannot be correct. In numerous cases, the Supreme Court has upheld Treasury Regulations construing words in tax statutes that may have a common or plain meaning in other contexts. For example, in *Helvering v. Reynolds*, 313 U.S. 428, 61 S.Ct. 971, 85 L.Ed. 1438 (1941), the court upheld a regulation construing the statutory term "acquisition" of a contingent remainder interest in property devised by will to mean when the decedent died, not when the remainderman obtained title many years later. The Court explained, "However unambiguous that word might be as respects other transactions . . . its meaning in this statutory setting was far from clear." *Id.* at 433, 61 S.Ct. 971.

Likewise, in *Magruder v. Washington, Baltimore & Annapolis Realty Corp.*, 316 U.S. 69, 73, 62 S.Ct. 922, 86 L.Ed. 1278 (1942), the Court in upholding the regulation at issue explained, "[t]he crucial words of the statute, 'carrying on or doing business,' are not so easy of application to varying facts that they leave no room for administrative interpretation or elucidation." In *United States v. Correll*, 389 U.S. 299, 304, 88 S.Ct. 445, 19 L.Ed.2d 537 (1967), the Court upheld a regulation limiting the deduction for travel expenses by excluding trips that require neither sleep nor rest, explaining "[t]he language of the statute—'meals and lodging . . . away from home'—is obviously not self-defining." In *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 476, 99 S.Ct. 1304, 59 L.Ed.2d 519 (1979), the Court upheld a regulation construing the term "business league," concluding that the term is "so general as to

render an interpretive regulation appropriate." And in *Cottage Savings Ass'n v. Commissioner*, 499 U.S. 554, 559-61, 111 S.Ct. 1503, 113 L.Ed.2d 589 (1991), the Court upheld a regulation construing the term "disposition of property" as being limited to exchanges of property for "materially different" property, an interpretation of the statute that a judge steeped in property law principles would surely find contrary to plain meaning. To be sure, the Court has occasionally invalidated Treasury Regulations or proposed regulations as contrary to the plain meaning of the statute. *See, e.g.*, *Knight v. Comm'r*, 552 U.S. 181, 128 S.Ct. 782, 169 L.Ed.2d 652 (2008); *Maass v. Higgins*, 312 U.S. 443, 61 S.Ct. 631, 85 L.Ed. 940 (1941). But in the vast majority of cases, the Court has not invalidated an interpretive Treasury Regulation simply because the statute used a term that has a plain or common meaning in other contexts.

In this case, the statute excepts from the term "wages" the services of "a student who is enrolled and regularly attending classes." The prior regulation construed this phrase as reflecting an integrated concept: "An employee who performs services in the employ of a school, college, or university, *as an incident to and for the purpose of pursuing a course of study* at such school, college, or university *has the status of a student* in the performance of such services." Treas. Reg. § 31.3121(b)(10)-2(c) (2004) (emphasis added). Significantly, the district court did not question the validity of this limitation. Indeed, it applied the former regulation after invalidating the amended regulation. This interpretation, which limits the student exception to services that are subordinate to the student's educational activities, is not the only

possible interpretation of the common words "student," "enrolled," and "regularly attending classes." But those words must be construed in context, and when the context is a provision of the Internal Revenue Code, a Treasury Regulation interpreting the words is nearly always appropriate. We hold that the statute is silent or ambiguous on the question whether a medical resident working for the school full-time is a "student who is enrolled and regularly attending classes" for purposes of 26 U.S.C. § 3121(b)(10).

B. Having concluded that the statute is silent or ambiguous on this question, we turn to the second part of the *Chevron* analysis, determining whether the Commissioner's amended regulation is a permissible interpretation of the statute. For this inquiry, the Supreme Court's opinion in *National Muffler* is instructive:

> In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to

> the regulation during subsequent re-enactments of the statute.

440 U.S. at 477, 99 S.Ct. 1304. We must defer to a Treasury Regulation so long as it is reasonable. *Cottage Savings*, 499 U.S. at 560-61, 111 S.Ct. 1503.

The amended regulation modified the general "incident to" test in the prior regulation by providing that "[t]he services of a full-time employee are not incident to and for the purpose of pursuing a course of study," and, more particularly, that an employee who works forty hours per week or more is considered "full-time." Treas. Reg. § 31.3121(b)(10)-2(d)(iii). This regulation "harmonizes" (does not conflict) with the plain language of the statute. Whether it is consistent with the student exception's origin and purpose requires closer scrutiny.

The student exception and other exceptions to the statutory definition of "wages" and "employment" were first enacted in the Social Security Act Amendments of 1939, Pub. L. No. 76-379, sec. 606, § 1426(a) & (b), 53 Stat. 1360, 1383-86. At this time, the Social Security program was in its infancy, and its coverage was less universal. The 1939 amendments excepted all federal, state, and local government employees, which included all employees of the University. *Id.* § 1426(b)(6), (7). In addition, services performed by employees of tax-exempt organizations were largely excluded, including service "performed by a student who is enrolled and is regularly attending classes at a school, college, or university." *Id.* § 1426(b)(10)(A)(iii). Services performed by students employed by a non-tax-exempt school were also excluded if the student was enrolled and regularly attending classes at that school *and* the remuneration in a calendar quarter

"does not exceed $45 (exclusive of room, board, and tuition)." § 1426(b)(7), (10)(A)(iii), & (10)(E), 53 Stat. at 1384-85. And Congress provided a separate exclusion for student nurses and medical interns employed by private hospitals. *Id.* § 1426(b)(13), 53 Stat. 1385. The congressional committee reports explained:

> The intent of the amendment is to exclude those persons and those organizations in which the employment is part-time or intermittent and the total amount of earnings is only nominal, and the payment of the tax is inconsequential and a nuisance. The benefit rights built up are also inconsequential. Many of those affected, such as students and the secretaries of lodges, will have other employment which will enable them to develop insurance benefits.

H.R. Rep. No. 76-728 (1939), *reprinted in* 1939-2 C.B. 538, 543; S. Rep. No. 76-734 (1939), *reprinted in* 1939-2 C.B. 565, 570.

When Congress amended the Social Security Act in 1950, it combined the student exception for employees of tax-exempt and non-exempt schools and eliminated the $45 remuneration limit, but severely limited the broad exception for services by other employees of tax-exempt organizations. Social Security Act Amendments of 1950, Pub. L. No. 81-734, sec. 204(a), § 1426(b)(11)(A) & (B), 64 Stat. 477, 531. The House Committee on Ways and Means report explained: "The bill would continue to exclude service performed for nominal amounts in the employ of tax-exempt nonprofit organizations, service performed by student nurses and internes,

[sic] and service performed by students in the employ of colleges and universities." H.R. Rep. No. 81-1300 (1950), *reprinted in* 1950-2 C.B. 255, 260; *see also* S. Rep. No. 81-1669 (1950), *reprinted in* 1950-2 C.B. 302, 308. Given the explicit legislative history that these FICA exceptions were directed to part-time workers, we conclude that the full-time employee limitation in the amended regulation is consistent with the origin and purpose of the student exception. *See Johnson City Med. Ctr. v. United States*, 999 F.2d 973 (6th Cir. 1993), upholding Revenue Ruling 85-74, 1985-1 C.B. 331, 332, which interpreted the student nurse exception as limited to employment "substantially less than full time" where "[t]he total amount of earnings is nominal."

Whether the regulation is a substantially contemporaneous construction of the statute or dates from a later period, the manner in which it evolved, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the issue are also complex factors in this case. Mayo and the University argue that the full-time employee provision is of recent vintage, which is obviously true, and is inconsistent with the Commissioner's "prior longstanding interpretation" of the statute, which requires close examination.

The provision limiting the student exception to services that are "incident to and for the purpose of pursuing a course of study" has been in the regulations for more than fifty years. *See* T.D. 6190, § 31.3121(b)(10)-2(c), 1956-2 C.B. 605, 653. We have found no reported rulings or decisions applying the student exception or this regulation to medical residents prior to 1978. There are likely a number of reasons for this vacuum: (i) in 1939 and for some years thereafter residents functioned more like

young doctors than students, (ii) all public employees were excluded until 1950 and until 1991 States could elect to exclude public employees, and (iii) at least some medical schools claimed their payments to residents were non-taxable scholarships. But a series of events brought this student exception issue to the fore:

- In 1964, the Sixth Circuit held that medical residents did not fall within the intern exception even though "distinctions between interns and residents-in-training have been substantially reduced in the years since 1939." *St. Luke's Hosp. Ass'n of Cleveland v. United States*, 1 Ohio Misc. 89, 333 F.2d 157, 164 (6th Cir. 1964). The student exception was not at issue in *St. Luke's*, likely because the employer was a private hospital, not a medical school.

- The next year, Congress expanded coverage of the Social Security program by repealing the intern exception and the exception for self-employed doctors. Social Security Amendments of 1965, Pub. L. No. 89-97, sec. 311, 79 Stat. 286, 380-81. The legislative history noted the plight of an intern's young widow and children left without Social Security benefits. H.R. Rep. No. 89-213 at 95 (1965), *reprinted in* 1965-2 C.B. 733, 735.

- In 1969, the Supreme Court ended the practice of treating stipends to medical residents as non-taxable "scholarships" when it ruled "that bargained-for payments, given only as a '*quo*' in return for the *quid* of services rendered," are not excludable from income as "scholarships." *Bingler v. Johnson*, 394 U.S. 741, 757, 89 S.Ct. 1439, 22 L.Ed.2d 695 (1969).

- In a 1978 ruling, the Commissioner of Social Security cited *St. Luke's* and observed, "[t]he Social Security Administration has always held that resident physicians are not students." Social Security Ruling 78-3, 1975-1982 Soc. Sec. Rep. Serv. 315, 1978 WL 14050 (S.S.A.).

- In a 1985 ruling, the Commissioner construed the language of the statute and its legislative history as limiting the student nurse exclusion to "substantially less than full-time" employment for "nominal" earnings. Rev. Rul. 85-74, 1985-1 C.B. 331. In *Johnson City*, the Sixth Circuit majority upheld that Revenue Ruling; even the dissent would have upheld the "substantially less than full-time" limitation. 999 F.2d at 983 (Batchelder, J., dissenting).

Mayo and the University argue that the amended regulations reflect a change from the "purely facts and circumstances approach" of the prior regulation, to "bright-line limitations upon eligibility." But they cite no evidence that the Commissioner has ever agreed that a medical resident working forty hours a week or more and earning upwards of $50,000 per year qualified for the student exception. Rather, the historical record reflects a consistent substantive policy applying the generally worded "incident to" regulation as not including full-time student employees. Our decisions in *Apfel* and *Mayo I* applied the prior regulation in a contrary manner, and the Commissioner responded with amended regulations more specifically articulating the underlying policy. The Supreme Court has repeatedly held that agencies may validly amend regulations to respond to adverse judicial decisions, or for other reasons, so long as the amended regulation is a permissible interpretation of

the statute. *See Dickman v. Comm'r*, 465 U.S. 330, 343, 104 S.Ct. 1086, 79 L.Ed.2d 343 (1984); *Morrissey v. Comm'r*, 296 U.S. 344, 354-56, 56 S.Ct. 289, 80 L.Ed. 263 (1935). An agency's substantial change of position is relevant to reasonableness, but not determinative. *Norwest Corp. v. Comm'r*, 69 F.3d 1404, 1410 (8th Cir. 1995), citing *Dickman*, *cert. denied*, 517 U.S. 1203, 116 S.Ct. 1704, 134 L.Ed.2d 802 (1996); *accord McNamee v. Dep't of the Treasury*, 488 F.3d 100, 109-10 (2d Cir. 2007).

Mayo and the University concede, as the district court recognized, that the prior regulation limiting the student exception to services "incident to and for the purpose of pursuing a course of study" is a permissible interpretation of the statutory student exception. In the notice of proposed rule-making, the IRS set forth a lengthy, detailed, historically accurate explanation of why "IRS and Treasury believe that Congress has shown the specific intent to provide social security coverage to individuals who work long hours, serve as highly skilled professionals, and typically share some or all of the terms of employment of career employees, particularly medical residents and interns." 69 Fed. Reg. 8604 at 8608. We conclude that this interpretation of the student exception, while not the only permissible interpretation, does not conflict with the plain language of the statute, and is consistent with the origin and purpose of the student exception as initially enacted and with Congress's frequent expansion of Social Security coverage in the last fifty years. We do not doubt—indeed we applaud—the educational benefits of the medical residency programs offered by Mayo and by the University. We do not rule that medical residents are not "students" or are not "enrolled" or are not

"regularly attending classes" for other purposes. But we conclude that the full-time employee regulation is a permissible interpretation of the statutory student exception and therefore, in the tax periods in question, the residents' compensation for health care and patient services was subject to FICA taxes.

III.

The government also argues that the district court erred in invalidating the amended regulation providing that an organization, in this case Mayo, is not a "school, college, or university" within the meaning of 26 U.S.C. § 3121(b)(10) unless its "primary function" is education. Although we are inclined to believe that this provision is arbitrary and unreasonable *in this context*, we need not decide the issue because it is undisputed that Mayo's medical residents did not fall within the student exception during the tax year in question because they worked more than forty hours per week and were therefore full-time employees. For the same reason, we need not address the Government's contention that the district court erred in concluding as a matter of law that the University's medical residents were employed by the University, not by the independent hospitals where their services were performed.

IV. CONCLUSION

For the foregoing reasons, the judgments of the district court are reversed, and the cases are remanded for entry of judgments in favor of the United States. Further proceedings to determine the proper terms of those judgments, if needed, are of course not foreclosed.

APPENDIX B

United States District Court,
D. Minnesota.

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH and Mayo Clinic, Plaintiffs,

v.

UNITED STATES of America, Defendant.

Civ. No. 06-5059 (RHK/JSM).

Aug. 3, 2007.

Thomas W. Tinkham, John W. Windhorst, Jr., Christopher R. Duggan, Kristina W. Carlson, Emily L. Fitzgerald, Dorsey & Whitney LLP, Minneapolis, MN, Robert M. Moore, Jr., Joanne L. Martin, Mayo Clinic, Rochester, MN, for Plaintiffs.

Michael R. Pahl, Trial Attorney, Tax Division, United States Department of Justice, Washington, D.C., for Defendant.

MEMORANDUM OPINION AND ORDER

KYLE, District Judge.

INTRODUCTION

Plaintiffs Mayo Foundation for Medical Education and Research ("MFMER") and Mayo Clinic ("Mayo") commenced this action against

Defendant United States of America for the refund of FICA taxes withheld and paid on Mayo's medical residents' stipends during the second quarter of 2005. The amount of Mayo's claim is $1,676,118.06, plus interest. This Court held in 2003 that stipends paid to medical residents in 1994-1996 qualify for the "student" exclusion from FICA taxation and that Mayo is a "school, college, or university" for purposes of the exclusion.[1] The IRS amended its regulations in 2004 (effective April 1, 2005) and, as a result, medical residents no longer qualify for the exclusion. Mayo now moves for summary judgment. For the reasons set forth below, the Court will grant Mayo's Motion on the basis that the amended regulations are invalid.

BACKGROUND

I. Plaintiffs MFMER and Mayo

Plaintiffs MFMER and Mayo are nonprofit corporations organized in Minnesota with their principal places of business in Rochester, Minnesota. (Pls.' Mem. at 2.) MFMER is the agent of Mayo for purposes of withholding and remitting FICA taxes and filing related tax returns. (Pls.' Mem. at 2.)

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[1] *United States v. Mayo Found. for Med. Educ. & Research*, 282 F.Supp.2d 997 (D. Minn. 2003) ("*Mayo I*"), *appeal dismissed by stipulation* (8th Cir. File No 03-3662, Jan. 7, 2004). In 2006, this Court entered judgment dismissing a tax refund case related to stipends paid to residents at Mayo for the period of 1997-2003, pursuant to the parties' stipulation that the residents' stipends were similarly excluded from FICA tax coverage during those years. *See Mayo Found. for Med. Educ. & Research v. United States* (D. Minn. Civ. No. 05-467, *judgment entered* May 5, 2006).

MFMER filed the tax return and the refund claim involved in this case. (*Id.*)

Mayo operates graduate medical education programs for medical residents and fellows ("residents").[2] Most of these programs are formally reviewed and approved by national accreditation bodies. (*Id.*) Residents are enrolled in the programs, register for courses, attend lectures, perform research, and participate in "teaching rounds" and patient care. (*Id.*)

Residents also receive grades or written evaluations for their performance in each course and may be terminated from the programs for failing to satisfy academic standards. (*Id.*) Mayo pays a stipend to the residents for the purpose of providing a minimum level of financial support during their enrollment. (*Id.* at 3.) Finally, residents receive formal certification upon completion of the programs. (*Id.*)

II. An Overview of the FICA Tax

The Federal Insurance Contributions Act ("FICA") imposes taxes upon employers and employees for the support of the social security system. *See* 26 U.S.C. § 3101 *et seq.* FICA taxes must be paid on "wages." *Id.* FICA defines "wages" as "all remuneration for employment, including the

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[2] A "resident" is an individual who has earned a Doctor of Medicine ("M.D.") degree and is participating in a residency program for additional medical training in a specialty field, such as internal medicine or surgery. A "fellow" is an individual who participates in a subspecialty program that offers more specialized training beyond what is learned in the residency program. *Mayo I*, 282 F.Supp.2d at 999 n. 1.

cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. § 3121(a). Employers collect FICA taxes by withholding the required amount from their employees' wages. *See* 26 U.S.C. § 3102(a). Employers also pay FICA contributions that equal the amount withheld from their employees' wages. *See* 26 U.S.C. § 3111(a). "Thus, FICA taxes are 'paid in part by employees through withholding, and in part by employers through an excise tax.'" *Ahmed v. United States*, 147 F.3d 791, 794 (8th Cir. 1998) (quoting *United States v. Lee*, 455 U.S. 252, 254 n. 1, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982)).

FICA excludes several categories of "service" from "employment," including "service performed in the employ of . . . a school, college, or university . . . if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10).

III. Amended Regulations

In February 2004, the Internal Revenue Service ("IRS") published a Notice of Proposed Rulemaking to amend its regulations governing the definition of "school, college, or university" and "student" for purposes of the student-FICA exception under 26 U.S.C. § 3121(b)(10). *See* Student FICA Exception, 69 Fed. Reg. 8604-8606 (proposed Feb. 25, 2004) (codified at 26 C.F.R. § 31.3121(b)(10)-2(c),(d)). The IRS explained that the proposed amendments were designed to address whether services performed as "on-the-job training" are excluded from employment under the student-FICA exception. *Id.* In particular, the IRS acknowledged that the Eighth Circuit addressed this issue with respect to medical

residents in *Minnesota v. Apfel*, 151 F.3d 742 (8th Cir. 1998). *See* 69 Fed. Reg. at 8605. In *Apfel*, the Eighth Circuit concluded that services performed by medical residents at the University of Minnesota did not constitute employment for social security purposes. *Apfel*, 151 F.3d at 745, 748.

The IRS also explained that the proposed amendments were designed to address whether an organization carrying on both noneducational and educational activities is a "school, college, or university" within the meaning of section 3121(b)(10). *See* 69 Fed. Reg. at 8605-06. The IRS indicated that it disagreed with this Court's holding in *Mayo I* that Mayo is a "school, college, or university" for purposes of the exclusion. *Id.* In *Mayo I*, this Court rejected the Government's argument that the "primary purpose" of an organization determines whether the organization is a "school, college, or university" for purposes of the student-FICA exception. *Mayo I*, 282 F.Supp.2d at 1013. The Court reasoned that the IRS "opt[ed] instead for a simple and straightforward statement that the term 'school, college, or university' should be taken in its commonly and generally accepted sense." *Id.* Nonetheless, the IRS stated that the proposed amendments would incorporate the "primary function" standard in the regulations. 69 Fed. Reg. at 8605-06.

On December 21, 2004, the IRS published its final amended regulations, which became effective for services performed on or after April 1, 2005.

A. Definition of "School, College, or University"

The amended regulations provide that:

> [a]n organization is a school, college, or university within the meaning of section 3121(b)(10) if its *primary function* is the presentation of formal instruction, it normally maintains a regular faculty and curriculum, and it normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on. See section 170(b)(1)(A)(ii) and the regulations thereunder.

26 C.F.R. § 31.3121(b)(10)-2(c) (emphasis added).

By comparison, the pre-amended regulations provided that "[t]he term 'school, college, or university' within the meaning of this exception is to be taken in its commonly or generally accepted sense." 26 C.F.R. § 31.3121(b)(10)-2(d) (Pre-4/1/05 Regulations).

B. Definition of "Student"

The amended regulations provide that student status ("General Rule") is determined by "the relationship of the employee with the organization employing the employee." 26 C.F.R. § 31.3121(b)(10)-2(d). In particular, an employee is a student if the services he or she provides are "incident to and for the purpose of pursuing a course of study." 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(i). In addition, "[t]he educational aspect of the relationship between the employer and the employee, as compared to the service aspect of the relationship, must be predominant in order for the employee's services to be incident to and for the purpose of pursuing a course of study." *Id.* The "educational" and "service" aspects of the relationship are based "on all the relevant facts and circumstances." *Id.*

The educational aspect of the relationship is generally evaluated based on the employee's "course workload" relative to the "full-time" course workload at the school, college, or university. 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iv). The service aspect is evaluated based on the employee's normal work schedule, number of hours worked, whether the employee is a "professional" or a "licensed professional," and whether the employee is eligible to receive certain kinds of employment benefits. 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(v).

C. Full-time Employee Exception

The amended regulations provide that "an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee" and therefore services performed by that individual are "not incident to and for the purpose of pursuing a course of study." 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii). Also, an employee's "normal work schedule" is "not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect." *Id.* Consequently, a medical resident who works 40 or more hours per week does not qualify for the student exclusion from FICA taxation.

In contrast, the pre-amended regulations provided that student status shall be determined "on the basis of the relationship of such employee with the organization for which the services are performed." 26 C.F.R. § 31.3121(b)(10)-2(c) (Pre-4/1/05 Regulations). Thus, "[a]n employee who perform[ed] services in the employ of a school, college, or university, as an incident to and for the purpose of pursuing a course of study" was a student.

Id. The pre-amended regulations did not have a full-time employee exception.

IV. Mayo's Refund Claim

Mayo withheld and paid FICA taxes on the stipends it paid to the residents for services performed on or after April 1, 2005. Thereafter, Mayo timely filed a refund claim with the IRS for $1,676,118.06. The IRS did not act upon the claim and Mayo filed this action. *See* 26 U.S.C. § 6532.

STANDARD OF DECISION

Summary judgment is proper if, drawing all reasonable inferences in favor of the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party bears the burden of showing that the material facts in the case are undisputed. *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548; *Mems v. City of St. Paul, Dep't of Fire &Safety Servs.*, 224 F.3d 735, 738 (8th Cir. 2000). The Court must view the evidence, and the inferences that may be reasonably drawn from it, in the light most favorable to the nonmoving party. *Graves v. Ark. Dep't of Fin. & Admin.*, 229 F.3d 721, 723 (8th Cir. 2000); *Calvit v. Minneapolis Pub. Schs.*, 122 F.3d 1112, 1116 (8th Cir. 1997). The nonmoving party may not rest on mere allegations or denials, but must show through the presentation of admissible evidence that specific facts exist creating a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995).

ANALYSIS

I. Invalidity of Amended Regulations

Mayo argues that the amended regulations are invalid and conflict with the regulations from the Social Security Administration (Counts One, Four, and Five). Mayo also argues that the Government is barred by collateral estoppel from re-litigating whether Mayo is a "school, college, or university" for purposes of the FICA-tax exclusion and whether medical residents qualify for the "student" exclusion (Counts Two, Three, Six, and Seven). Because the Court finds that the amended regulations are invalid, it is not necessary to address the collateral-estoppel issue or whether the amended regulations conflict with the regulations from the Social Security Administration.

A. Secretary's Authority to Issue Regulations

The Secretary of the Treasury may issue two types of regulations: (1) a "legislative" regulation pursuant to a specific delegation from Congress; or (2) an "interpretive" regulation pursuant to the general authority vested in the Secretary under section 7805(a) of the Internal Revenue Code. *See Tutor-Saliba Corp. v. Comm'r*, 115 T.C. 1, 7, 2000 WL 976802 (2000).

Here, the parties agree that the amended regulations are interpretive. The Secretary has a broad delegation of general authority from Congress to "prescribe all needful rules and regulations for the enforcement of [the Internal Revenue Code]." 26 U.S.C. 7805(a); *accord United States v. Correll*, 389 U.S. 299, 306-07, 88 S.Ct. 445, 19 L.Ed.2d 537 (1967). However, the delegated authority is not limitless, as "[t]he Secretary's authority to issue

regulations is not the power to make law; it is the power to carry into effect the will of Congress as expressed in the statute under which the regulations are prescribed." *Swallows Holding, Ltd. v. Comm'r*, 126 T.C. 96, 129, 2006 WL 196305 (2006) (citing *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134-35, 56 S.Ct. 397, 80 L.Ed. 528 (1936)).

B. Review of an Interpretive Tax Regulation

This Court's review of an interpretive tax regulation is governed by the standards set forth in *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 99 S.Ct. 1304, 59 L.Ed.2d 519 (1979). In *National Muffler*, the Supreme Court held that an interpretive regulation is valid if it "implement[s] the congressional mandate in some reasonable manner." *Id.* at 476, 99 S.Ct. 1304 (citation and internal quotations omitted). An interpretive tax regulation is reasonable only if it "harmonizes with the plain language of the statute, its origin, and its purpose." *Id.* at 477, 99 S.Ct. 1304. The Supreme Court has listed the following factors for determining the validity of an interpretive regulation:

(1) A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent.

(2) If the regulation dates from a later period, the manner in which it evolved merits inquiry.

(3) Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the

> degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.

Id. Thereafter, the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), explained that a court is confronted with two issues when reviewing an agency's construction of a statute that it administers. First, the court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 843-44, 104 S.Ct. 2778. If, however, the court determines that "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 844, 104 S.Ct. 2778.

Mayo argues that this Court's review of the amended regulations is governed by *National Muffler*, because that case, unlike *Chevron*, dealt with an interpretive tax regulation. However, the Government argues that *Chevron* is the proper standard. There is no indication that the standard in *National Muffler* was changed by *Chevron*. Regardless, the Court reaches the same conclusion under either standard.

C. The "Primary Function" Test is Invalid (Count 4)

The Court first addresses whether the plain meaning of the term "school, college, or university" includes a "primary function" test under section 3121(b)(10). *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly express legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").

As a threshold matter, section 3121(b)(10) (the "Student Exclusion") excludes several categories of "service" from "employment," including "service performed in the employ of . . . a school, college, or university . . . if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10). The Government argues that the statutory language of the Student Exclusion is ambiguous.[3]

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[3] The Government's memorandum, cites in a footnote, *United States v. Detroit Medical Center*, No. 05-71722, 2006 WL 3497312, at *9 (E.D. Mich. Dec. 1, 2006), for support that the language of the Student Exclusion is ambiguous. (Def's. Mem. at 3 n. 8.) The Government asserted at oral argument that this Court in *Mayo I* implicitly found the Student Exclusion to be ambiguous because it looked to the Treasury Regulations for guidance. (Tr. 19-20.) However, in *Mayo I*, this Court expressly determined that the Student Exclusion was not ambiguous and cited to an extensive factual record as to why Mayo is a "school, college, or university" for purposes of the exclusion and why medical residents qualify for the "student" exclusion from FICA

The Court finds that this provision is not complicated or filled with technical language, but is straightforward. *See Mayo I*, 282 F.Supp.2d at 1007, 1013 (finding that the language of 26 U.S.C. § 3121(b)(10) is unambiguous); *see also United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1251 (11th Cir. 2007) (holding "that the statutory language of 26 U.S.C. § 3121(b)(10) is not ambiguous.").

Mayo argues the ordinary definition of "school, college, or university" under the Student Exclusion is not ambiguous and therefore the amended regulations' use of the "primary function" standard to define "school, college, or university" is contrary to the plain meaning of the statute. (Pls.' Mem. at 14-15.) The Government argues that the statute does not define the term "school, college, or university" and therefore the language of the statute is ambiguous. (Def.'s Mem. at 20.) As such, the Government asserts that the "primary function" test helps define whether an organization is a "school, college, or university." (*Id.*)

Mayo provided the Court with dictionary definitions for the terms "school," "college," and "university," such as the following: (a) School: "an establishment for teaching a particular skill or group of skills"; (b) College: "an institution offering instruction [usually] in a professional, vocational, or

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[Footnote continued from previous page]

taxation. *Mayo I*, 282 F.Supp.2d at 1007, 1013-18. The Government's argument that this Court implicitly found the Student Exclusion ambiguous is quite puzzling when it expressly determined that it was not.

technical field"; and (c) University: "an institution of higher learning providing facilities for teaching and research and authorized to grant academic degrees." *See Webster's New Int'l Dictionary* 2031, 445, 2502 (3d ed. 1981). Mayo argues that these definitions do not state or imply that education must be the "primary function" for an organization to qualify as a "school, college, or university." The Government argues that Mayo's use of a dictionary demonstrates the term's ambiguity and points out that an earlier edition of *Webster*'s dictionary defined school as broadly as "[a]ny place or means of learning or discipline; as, the school of experience" and as narrowly as "[a] faculty or institution for specialized higher education, usually within a university; as, a medical or law school; a school of education." *See Webster's New Int'l Dictionary* 2236 (2d ed. 1935). The Court is not persuaded by the Government's argument.

Here, neither of the Government's proffered definitions would exclude Mayo as a school, college, or university, nor would they suggest that there is a meaning that excludes an institution based upon its primary function. Thus, the Government has no basis to argue from the statute or from the dictionary definitions of these words that there is an ambiguity that supports the Government's atypical definition. A natural reading of the full text in which the term "school, college, or university" appears demonstrates that it is not ambiguous, but is commonly and generally understood. Indeed, the term "school, college, or university" has existed with clarity in the statute for over 60 years.

Accordingly, the Court finds that the term "school, college, or university" is not ambiguous, but has a well-defined meaning and common usage

outside the framework of the Student Exclusion. The Court recognizes that words in a revenue act generally are interpreted in their "ordinary, everyday senses." *Comm'r v. Soliman*, 506 U.S. 168, 174, 113 S.Ct. 701, 121 L.Ed.2d 634 (1993) (quoting *Malat v. Riddell*, 383 U.S. 569, 571, 86 S.Ct. 1030, 16 L.Ed.2d 102 (1966) (quoting *Crane v. Comm'r* 331 U.S. 1, 6, 67 S.Ct. 1047, 91 L.Ed. 1301 (1947))); *see also Helvering v. Horst*, 311 U.S. 112, 118, 61 S.Ct. 144, 85 L.Ed. 75 (1940) ("Common understanding and experience are the touchstones for the interpretation of revenue laws."). Whether an organization qualifies as a "school, college, or university" is a factual inquiry. The Government has presented no compelling argument that the language in the Student Exclusion has any meaning other than its natural and plain meaning.

The Court next considers the factors set forth in *National Muffler*: (1) whether the regulation is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent; (2) the manner in which a regulation dating from a later period evolved; (3) the length of time that the regulation has been in effect; (4) the reliance placed upon the regulation; (5) the consistency of the Secretary's interpretation; and (6) the degree of scrutiny Congress has devoted to the regulation during subsequent reenactments of the statute. *National Muffler*, 440 U.S. at 477, 99 S.Ct. 1304.

First, the Student Exclusion was enacted in 1939, and the amended regulations incorporating the "primary function" test were issued in 2004, 65 years

later.[4] Thus, the disputed regulations are not a "substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent." *Id.*

Next, the Court inquires into the manner in which the disputed regulations evolved. The amended regulations were issued only after this Court rejected the "primary function" test. *Mayo I*, 282 F.Supp.2d at 1013. In *Mayo I*, the Court determined that "[a]ctual care in the service of patients is inherent in the educational process . . . [and] [b]ecause the objective of the resident programs is to ultimately make physicians capable of caring for patients twenty-four hours a day and seven days a week, it is impossible to separate 'education' from 'patient care.'" *Id.* at 1014-15. The Court concluded that the "primary function" test did not apply because the plain meaning of the Student Exclusion was unambiguous.[5] *Id.* at 1007, 1013.

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[4] The original treasury regulation under the Student Exclusion was adopted in 1940 and did not include any reference to a "primary function" test; it remained basically unchanged until the amended regulations were adopted in 2004. *See* 5 Fed. Reg. 773, 785-786 (1940). This regulation was carried over and recodified when the 1954 Code was enacted. 21 Fed. Reg. 1011, 1027 (1956).

[5] The Court further held that even if a "primary function" test applied, Mayo satisfied that test because it is a "non-profit institution having as its charitable purposes medical education and scientific research. [Mayo] operates five medical schools and . . . spends more on medical education and research than it receives from patient care." *Mayo I*, 282 F.Supp.2d at 1013 n. 30.

The Government also argues that the Treasury's promulgation of the amended regulations in response to this Court's decision in *Mayo I* was permissible under *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005).[6] In *Brand X*, the Supreme Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982, 125 S.Ct. 2688. The Court stated that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Id.* at 982-83, 125 S.Ct. 2688. The Supreme Court concluded that the statutory term "offering" was ambiguous (based on conflicting dictionary definitions) and looked to the legislative history in concluding that the agency's interpretation of the statute was reasonable. *Id.* at 989-93, 125 S.Ct. 2688.

Here, this Court held in *Mayo I* that the language of the Student Exclusion was unambiguous. *Mayo I*, 282 F.Supp.2d at 1007, 1013. This Court did not look past the plain language of the statute because "when the statute's language is

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[6] It is not clear whether the Supreme Court's decision in *Brand X*, which neither cited *National Muffler* nor involved an interpretive tax regulation, applies to federal tax regulations; this Court does not decide that question.

plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (citations and internal quotations omitted). The language of the Student Exclusion is clear; if Congress desires to use the "primary function" test as the standard for defining "school, college, or university" then Congress will have to make that change. *See CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1228 (11th Cir. 2001) ("[I]f Congress really meant in § 1005(a)(2)(B)(iii) of the Improvement Act to grandfather only involuntary terminations resulting from court orders, then why did it say 'any termination'? Why not simply say 'any involuntary termination' or 'any termination resulting from court orders'? It could have easily done so, but it did not.").

Furthermore, the amended regulations have only been in effect for approximately two years. Thus, it is unlikely that any party has substantially relied upon them. Also, the "primary function" test is inconsistent with the long-standing interpretation of the Student Exclusion by the IRS.[7] Finally, Congress has not amended the Student Exclusion since the amended regulations were adopted and

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[7] The Student Exclusion was enacted in 1939 and the IRS never indicated that the "primary function" test should be applied in defining "school, college, or university" until 2001, when the IRS released a "chief counsel advice" memorandum taking that position. *See* IRS CCA 200145040 (Nov. 9, 2001).

therefore has not had an opportunity to scrutinize them.

For these reasons, the Court finds that the "primary function" test is inconsistent with the plain meaning of the statute and is invalid. Accordingly, the Court grants Mayo's request for summary judgment on Count Four of its Complaint.

D. The Full-Time Employee Exception is Invalid (Count One)

Mayo also argues that the full-time employee exception is invalid because it is inconsistent with the plain meaning of the statute and is arbitrary, capricious, and unreasonable. In particular, Mayo argues that the definition of "student" is clear and unambiguous. The Government, however, asserts that the definition of "student" is ambiguous and argues that the term "student" is so general that a rule categorically denying student status to a full-time employee is a permissible and reasonable interpretation.[8]

The amended regulations provide that an employee is a student if the services he or she

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[8] The Government also argues that a bright-line rule is necessary to address whether services in the nature of on-job-training qualify for the student-FICA exception. (Def.'s Mem. at 28.) The Court disagrees. The Government's characterization of a residency program as "on the job" training misses the mark and ignores the fact that residents apply to and enroll in a residency program for an educational purpose. *See Mayo I*, 282 F.Supp.2d at 1017. Indeed, Mayo's residency program provides a formal and structured educational program where residents register for courses, attend lectures, perform research, and participate in "teaching rounds" and patient care. (Nelson Aff. ¶ 3.)

performs are "incident to and for the purpose of pursuing a course of study" at the employer organization and the educational aspect of the relationship between the employer and employee predominates over the service aspect of the relationship. 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(i). However, "an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee" and therefore the services of a full-time employee are "not incident to and for the purpose of pursuing a course of study." 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii).

The Court finds that the term "student" is not ambiguous. The word "student" is well defined and commonly understood outside the context of the Student Exclusion. The dictionary defines "student" as an individual who engages in "study" and is "enrolled in a class or course in a school, college, or university." *Webster's New Int'l Dictionary* 2268 (3d ed. 1981); *see also Oxford Universal Dictionary* 2049-50 (3d ed. 1955) (a "student" is an individual who engages in "study" by applying the mind "to the acquisition of learning, whether by means of books, observation, or experiment"). A natural reading of the full text in which the term "student" appears demonstrates that an employee is a "student" so long as the educational aspect of his service predominates over the service aspect of the relationship with his employer. The statutory language of the Student Exclusion excludes from employment "service performed in the employ of a school, college, or university . . . if such service is performed by a student who is *enrolled and regularly attending classes* at such school, college, or university." 26 U.S.C. § 3121(b)(10) (emphasis added). Thus, Congress already put its limitations on the word

"student"—those limitations only require a student to be enrolled and regularly attending classes. Congress did *not* put any limitation on "student" with regard to how much that individual might be working in some ancillary capacity.

The full-time employee exception arbitrarily narrows this definition by providing that a "full-time" employee is not a "student" even if the educational aspect of an employee's service predominates over the service aspect. Accordingly, the Court finds that the full-time employee exception is inconsistent with the plain meaning of the statute and the expressed intent of Congress.[9] The Court also finds that the regulatory distinction between the General Rule for determining student status and the full-time employee exception ignores the educational aspect of student services (no matter how central to the program in which the student is enrolled) merely because the services are performed by an individual who works more than 40 hours per week. Indeed, it denies "student" status to medical residents even though the services they provide are primarily for educational purposes and essential to becoming fully qualified physicians. The Government has failed to show that Congress intended to ignore the educational value of such services in applying the Student Exclusion. Accordingly, the Court determines that the full-time employee exception of the amended regulations is invalid because it

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[9] "[I]t is not reasonable for the Secretary (or anyone else for that matter) to construe a statute's unambiguous meaning in a manner contrary to that intended by Congress in passing the legislation." *Swallows Holding*, 126 T.C. at 147.

arbitrarily restricts the ordinary meaning of "student."

The factors set forth in *National Muffler* also indicate that the full-time employee exception is invalid. First, the exception is not a "substantially contemporaneous construction" of the Student Exclusion because this amended regulation was added 65 years after the Student Exclusion was enacted.

Second, the exception was adopted only after adverse decisions from the Eighth Circuit and this Court. In *Mayo I*, this Court stated that the student-status test is comparable to the implementing regulation the Eighth Circuit considered in *Apfel*, which held that the proper analysis requires "a case-by-case examination" to determine whether the residents' relationship with the organization was "*primarily for educational purposes or primarily to earn a living*." *Apfel*, 151 F.3d at 748 (emphasis added). In *Mayo I*, this Court found that the residents were clearly enrolled in a residency program and were regularly attending classes.[10] *Mayo I*, 282 F.Supp.2d at 1015-17. The Court concluded that the residents' relationship with Mayo was primarily for educational purposes. *Id.* at 1018. In addition, the decisions in *Apfel* and *Mayo I*

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[10] The record in *Mayo I* showed that the "residency programs included (1) core curriculum conferences, (2) primary care conferences, (3) grand rounds, (4) morbidity and mortality conferences, and (5) journal clubs . . . Attendance at the conferences and teaching rounds was mandatory . . . and the residents' performance in each subject matter rotation was evaluated, graded, and recorded on the residents' transcripts." *Mayo I*, 282 F.Supp.2d at 1016-17.

rejected the Government's argument that courts should defer to a "bright-line" rule that medical residents can never be exempted from FICA taxation as students.[11] *Id.* at 1007. Yet, that is exactly what the full-time employee exception does.

Third, this exception has only been in effect for two years, and it is unlikely that any party has substantially relied upon it. Furthermore, the full-time employee exception is inconsistent with the IRS's longstanding interpretation of the Student Exclusion, which has applied a facts-and-circumstances approach and not a bright-line rule that categorically denies "student" status.[12] Finally, Congress has not amended the Student Exclusion since the amended regulations were adopted and

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[11] *See also Mount Sinai*, 486 F.3d at 1252-53 (rejecting Government's assertion that courts should defer to a "bright-line" rule that medical residents can never qualify for the FICA exemption as students); *Ctr. for Family Med. v. United States*, 456 F.Supp.2d 1115, 1119 (D. S.D. 2006) (rejecting Government's argument that medical residents are never students as a matter of law).

[12] *See, e.g.*, Rev. Proc. 98-16, 1998-1 C.B. 403 (explaining that an individual who does not qualify for student-FICA exclusion under the standards applicable to undergraduate and graduate students may qualify on the basis "of all the facts and circumstances."); IRS CCA 200029030 (July 21, 2000) ("determination of the status of [medical residents] as students requires examination of the facts and circumstances . . . A *per se* position that medical residents are not students within the meaning of § 3121(b)(10) would be inconsistent with the regulations. . . .)" IRS CCA 200212029 (Mar. 22, 2002) ("whether medical residents are students depends upon the facts and circumstances in each case.").

therefore has not had an opportunity to scrutinize them.

The Court finds that the full-time employee exception is invalid because it is inconsistent with the plain meaning of the statute and is arbitrary, capricious, and unreasonable. Accordingly, Mayo is entitled to summary judgment on Count One of its Complaint.

II. Government's Rule 56(f) Request

The Government asserts that it has not conducted any discovery regarding Mayo's medical program or its medical residents for the tax period relevant to this lawsuit—the second quarter of 2005. In particular, the Government argues that *if* this Court invalidates the regulations, then it will need to conduct discovery on the second quarter of 2005, and thus opposes Mayo's Motion under Rule 56(f) of the Federal Rules of Civil Procedure.

"Rule 56(f) allows a party to request a delay in granting summary judgment if the party can make a good faith showing that postponement of the ruling would enable it to discover additional evidence which might rebut the movant's showing of the absence of a genuine issue of material fact." *Robinson v. Terex Corp.*, 439 F.3d 465, 467 (8th Cir. 2006) (citing Fed.R.Civ.P. 56(f)); *accord Small Bus. Admin. v. Light*, 766 F.2d 394, 397-98 (8th Cir. 1985). In particular, Rule 56(f) requires the party opposing summary judgment to file an affidavit with the district court showing what specific facts additional discovery might uncover. *Dulany v. Carnahan*, 132 F.3d 1234, 1238 (8th Cir. 1997).

Thus, the party opposing the motion for summary judgment "may not simply rely on vague assertions that additional discovery will produce

needed, but unspecified, facts." *SEC v. Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir. 1980). Similarly, a court will deny a Rule 56(f) request if the discovery sought is cumulative or the party merely "hopes" or has a "hunch" that evidence will emerge. 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2741(3d ed. 1998). As such, if a party fails to carry its burden under Rule 56(f), "postponement of a ruling on a motion for summary judgment is unjustified." *Humphreys v. Roche Biomed. Labs., Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993).

Here, the Government's affidavit in support of its Rule 56(f) request falls short of these requirements. The Government asserts that it needs to conduct discovery to determine whether material facts are in dispute as to three broad categories: (1) whether the Mayo residents perform services "in the employ of the Foundation"; (2) whether the Foundation is a "school"; and (3) whether the Mayo residents are "student[s]" enrolled and regularly attending classes at the Foundation. (Pahl Aff. ¶ 14.) The Government indicated that it "disputes the facts set forth in [Mayo's supporting] affidavit relating to each of these three categories for the second quarter of 2005." (Pahl Aff. ¶ 16.)

However, the facts needed to decide this Motion were subject to discovery in *Mayo I*. Also, as part of the 2006 settlement of the 1997-2003 litigation, the Government accepted Mayo's supporting affidavit dated June 10, 2005, which is similar to the affidavit filed by Mayo in support of this Motion. (Pls.' Reply Mem. at 13-14.) The affidavit in support of Mayo's Motion is very detailed and indicates that the facts in this case compared to the previous cases between the parties are essentially identical. (Nelson Aff.

¶¶ 1-37.) The Government's supporting affidavit does not allege any specific material factual dispute, but merely asserts that discovery "may" help determine if there is a genuine issue of material fact regarding Mayo's medical program or its medical residents for the second quarter of 2005. (Pahl Aff. ¶¶ 11-13, 17.)

The Court finds that the Government's affidavit contains only conclusory assertions regarding any factual dispute and fails to show what specific facts additional discovery might uncover—it amounts to nothing more than vague assertions that additional discovery will produce needed, but unspecified, facts. Consequently, the Government has failed to show how discovery will provide rebuttal to Mayo's claims.

The Court also finds that the Government's Rule 56(f) request essentially seeks an advisory opinion before it determines whether discovery is necessary. Here, the Government argues that it will need to conduct discovery on the second quarter of 2005 only "*[i]f the Court invalidates the regulations.*" (Def.'s Mem. at 50 (emphasis added).) However, "Rule 56(f) permits a party opposing summary judgment to seek a continuance *and postpone a summary judgment decision* until adequate discovery has been completed." *Dulany*, 132 F.3d at 1238 (emphasis added). If the Government truly believed that discovery was necessary in this case, then it could have asked this Court to postpone its decision. It did not. Therefore, the Court denies the Government's Rule 56(f) request.

CONCLUSION

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS ORDERED** that:

1. Plaintiffs' Motion for Summary Judgment (Doc. No. 11) is **GRANTED IN PART** as follows:

   a. Plaintiffs' Motion is **GRANTED** as to Counts One and Four of its Complaint; Plaintiffs are entitled to a refund of FICA taxes withheld and paid in the amount of $1,676,118.06, plus interest; and

   b. Counts Two, Three, Five, Six and Seven of Plaintiffs' Complaint are **DISMISSED WITHOUT PREJUDICE**.

2. Defendant's Rule 56(f) request is **DENIED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

APPENDIX C

United States District Court,
D. Minnesota.

REGENTS OF the UNIVERSITY OF MINNESOTA, Plaintiff,

v.

UNITED STATES of America, Defendant.

Civ. No. 06-5084 (RHK/JSM).

April 1, 2008.

Thomas W. Tinkham, Kristina W. Carlson, John W. Windhorst, Jr., Christopher R. Duggan, Emily L. Fitzgerald, Theresa M. Bevilacqua, William R. Goetz, Dorsey & Whitney LLP, Minneapolis, Minnesota, William P. Donohue, University of Minnesota, Minneapolis, MN, for Plaintiff.

Michael R. Pahl, Trial Attorney, Tax Division, United States Department of Justice, Washington, D.C., for Defendant.

MEMORANDUM OPINION AND ORDER

RICHARD H. KYLE, District Judge.

INTRODUCTION

Plaintiff Regents of the University of Minnesota (the "University") commenced this action against Defendant United States of America seeking a refund of the FICA taxes withheld and paid on

medical residents' stipends during the second quarter of 2005.[1] The amount of the University's claim is $1,094,803.92, plus interest. The University has moved for summary judgment. For the reasons stated below, the Court will grant that Motion.

BACKGROUND

The University operates graduate medical education programs for medical residents and fellows ("residents"). (Compl.¶ 5.) A medical resident is an individual who has earned a medical degree and is participating in a residency program for additional medical training in a specialty field, such as internal medicine or surgery. The University entered into affiliation agreements with certain hospitals in Minnesota for the purpose of providing educational experiences to the residents.[2] (*See, e.g.*, Pahl Decl. Tab 2 Ex. 114 at UM 02692.) Pursuant to the affiliation agreements, the University had responsibility for the general educational experience of the residents, including (1) determining educational goals, (2) establishing prerequisite criteria for placement, (3) determining completion of assignments, (4) evaluating the residents' performance, and (5) selecting and appointing staff members at the affiliated hospital to the faculty of the University for the purpose of training the residents. (*Id.* at UM 02692-02693.) Staff physicians appointed to the University faculty had the "responsibility for teaching, supervising, and

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[1] FICA taxes refer to taxes collected pursuant to the Federal Insurance Contributions Act ("FICA").

[2] The University sold its own hospital to Fairview in 1997. (*See* Doc. No. 28 at ¶¶ 6-10, Ex. 5.)

evaluating the performance of residents." (*Id.* at UM 02695.) In addition, the University paid a stipend to the residents for the purpose of providing a minimum level of financial support during their enrollment. (Compl.¶ 5.)

FICA imposes taxes upon employers and employees for the support of the social security system. *See* 26 U.S.C. § 3101 *et seq.* FICA taxes must be paid on "wages." *Id.* FICA defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. § 3121(a). Employers collect FICA taxes by withholding the required amounts from their employees' wages. *See* 26 U.S.C. § 3102(a). Employers also pay FICA contributions equal to the amounts withheld from their employees' wages. *See* 26 U.S.C. § 3111(a). "Thus, FICA taxes are 'paid in part by employees through withholding, and in part by employers through an excise tax.' "*Ahmed v. United States*, 147 F.3d 791, 794 (8th Cir. 1998) (quoting *United States v. Lee*, 455 U.S. 252, 254 n. 1 (1982)).

FICA, however, excludes several categories of "service" from "employment," including "service performed in the employ of . . . a school, college, or university . . . if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10) ("Student Exclusion").

In 1998, the Eighth Circuit Court of Appeals held that stipends paid by the University to medical residents in 1985-1986 qualified for the Student Exclusion from FICA taxation. *See Minnesota v. Apfel*, 151 F.3d 742 (8th Cir. 1998). In 2003, this

Court similarly held that stipends paid by the Mayo Foundation to its medical residents in 1994-1996 qualified for the Student Exclusion.[3] *See United States v. Mayo Found. for Med. Educ. & Research*, 282 F.Supp.2d 997 (D. Minn. 2003) ("*Mayo I*"), *appeal dismissed by stipulation* (8th Cir. File No. 03-3662, Jan. 7, 2004). In response to *Apfel* and *Mayo I*, the IRS amended its regulations in 2004 (effective April 1, 2005) so that medical residents no longer qualified for the exclusion.

The amended regulations provide in pertinent part that student status is determined by "the relationship of the employee with the organization employing the employee." ("General Rule")[4] 26 C.F.R. § 31.3121(b)(10)-2(d). In particular, an employee is deemed a student if the services provided are "incident to and for the purpose of pursuing a course of study." 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(i). In addition, "[t]he educational aspect of the relationship between the

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[3] In 2006, this Court entered judgment dismissing a tax refund case related to stipends paid to residents at Mayo for the period of 1997-2003, pursuant to the parties' stipulation that the residents' stipends were similarly excluded from FICA tax coverage during those years. *See Mayo Found. for Med. Educ. & Research v. United States* (D. Minn. Civ. No. 05-467, *judgment entered* May 5, 2006).

[4] The amended regulations also added a "primary function test" to the definition of a "school, college, or university." 26 C.F.R. § 31.3121(b)(10)-2(c). By comparison, the pre-amended regulations provided that "[t]he term 'school, college, or university' within the meaning of this exception is to be taken in its commonly or generally accepted sense." 26 C.F.R § 31.3121(b)(10)-2(d) (Pre-4/1/05). There is no dispute that the University meets either definition.

employer and the employee, as compared to the service aspect of the relationship, must be predominant in order for the employee's services to be incident to and for the purpose of pursuing a course of study." *Id.* The "educational" and "service" aspects of the relationship are based "on all the relevant facts and circumstances." *Id.*

However, the amended regulations also provide that "an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee," and therefore services performed by that individual are "not incident to and for the purpose of pursuing a course of study." 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii) ("Full-time Employee Exception"). In addition, an employee's "normal work schedule" is "not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect." *Id.* Consequently, a medical resident who works 40 or more hours per week no longer qualifies for the Student Exclusion.

In contrast, the pre-amended regulations provided that student status should be determined "on the basis of the relationship of such employee with the organization for which the services are performed" and that "[a]n employee who perform[ed] services in the employ of a school, college, or university, as an incident to and for the purpose of pursuing a course of study" was a student. 26 C.F.R. § 31.3121(b)(10)-2(c) (Pre-4/1/05). The pre-amended regulations did not have a Full-time Employee Exception.

The University withheld and paid FICA taxes on the stipends it paid to medical residents enrolled in its residency programs during the second quarter of

2005. Thereafter, the University timely filed a refund claim with the IRS for $1,094,803.92, asserting that the Full-time Employee exception of the amended regulations was invalid. The IRS did not act upon the claim, and in December 2006, the University filed this action.[5] *See* 26 U.S.C. § 6532. In August 2007, this Court held that the amended regulations were invalid. *See Mayo Found. for Med. Educ. & Research v. United States*, 503 F.Supp.2d 1164, 1171-77 (D. Minn. 2007) ("*Mayo II*").[6]

STANDARD OF DECISION

Summary judgment is proper if, drawing all reasonable inferences in favor of the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the burden of showing that the material facts in the case are undisputed. *Celotex*, 477 U.S. at 322; *Mems v. City of St. Paul, Dep't of Fire & Safety Servs.*, 224 F.3d 735, 738 (8th Cir. 2000). The Court must view the evidence, and the inferences that may be reasonably drawn from it, in the light most favorable to the nonmoving party. *Graves v. Ark. Dep't of Fin. & Admin.*, 229 F.3d 721, 723 (8th Cir.

[5] Count One of the University's Complaint seeks a refund of the FICA taxes withheld and paid on the residents' stipends during the second quarter of 2005 on the basis that the Full time Employee Exception is invalid. Counts Two, Three, and Four seek the same relief under alternative theories. (*See* Compl. ¶¶ 19-37.)

[6] The Government has appealed *Mayo II* to the Eighth Circuit.

2000); *Calvit v. Minneapolis Pub. Schs.*, 122 F.3d 1112, 1116 (8th Cir. 1997). The nonmoving party may not rest on mere allegations or denials, but must show through the presentation of admissible evidence that specific facts exist creating a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995).

ANALYSIS

The University asserts that the Full-time Employee Exception of the amended regulations is invalid because it is inconsistent with the plain meaning of the Student Exclusion or, alternatively, conflicts with regulations promulgated by the Social Security Administration. (Pl.'s Mem. at 10-15.) It also contends that the Government is barred by collateral estoppel from re-litigating whether medical residents qualify for the Student Exclusion or, alternatively, that residents qualify for the exclusion based on the merits. (Pl.'s Reply Mem. at 15-29.) In response, the Government asserts that collateral estoppel does not apply because the controlling facts and applicable legal rules have changed. (Def.'s Second Opp'n Mem. at 31-43.) It further argues that there is a genuine issue of material fact as to whether residents qualify for the Student Exclusion. (*Id.* at 5-29, 44-54.) Finally, the Government briefly argues that the amended regulations are valid, but recognizes that this Court held otherwise in *Mayo II*.[7] (*Id.* at 54-56.)

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[7] The Government asserts that this Court's review of the amended regulations is governed by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984),

Because the Court previously held in *Mayo II* that the Full-time Employee Exception of the amended regulations is invalid, it is not necessary to address the collateral-estoppel issue or whether the amended regulations conflict with the regulations from the Social Security Administration. Therefore, the Court will determine (1) whether the residents were "employed" by the University and (2) whether they were "students" who "regularly attend[ed] classes" at the University so as to qualify for the Student Exclusion.

[Footnote continued from previous page]

and not *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472 (1979). In support of this argument, the Government relies upon *Swallows Holding, Ltd. v. Commissioner*, 515 F.3d 162, 167 (3rd Cir. 2008), which held "that the Tax Court erred in applying *National Muffler* to the extent that the *National Muffler* factors are inconsistent with [the] *Chevron* analysis." In *Mayo II*, this Court stated that "[t]here is no indication that the standard in *National Muffler* was changed by *Chevron*. Regardless, the Court reaches the same conclusion under either standard." 503 F.Supp.2d at 1171. Indeed, the Government fails to get past the first prong of the *Chevron* analysis because this Court held in *Mayo I* that the statutory language of the Student Exclusion was clear and unambiguous. *Id.* at 1171-73, 1175-76 (citing *Mayo I*, 282 F.Supp.2d at 1007, 1013-18). Under *Chevron*, if the statutory language is clear, the Court's inquiry ends and the plain meaning of the statute governs the action. 467 U.S. at 842-43.

I. Application of the Student Exclusion to the University Residents[8]

A. "In the Employ of a School, College, or University"

The first issue is whether the residents' services are performed in the "employ" of the University. For FICA purposes, the employment relationship is determined under the "common-law" employer-employee relationship as follows:

> Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. . . . Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services. . . .

26 C.F.R. § 31.3121(d)-1(c). The Government contends that the hospitals possessed the right to control the residents and direct the manner and means by which they provided patient care.[9] (Def.'s

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[8] Because the Court has previously held that the amended regulations are invalid, the Court will apply the pre-amended regulations to determine whether the residents qualify for the Student Exclusion.

[9] The Government relies upon several cases to show that the residents were controlled by the staff physicians at the hospitals and therefore were employed by the hospitals. (*See* Def.'s Second Opp'n Mem. at 44-46.) Those cases, however, are inapposite. Indeed, *Cody v. Ribicoff*, 289 F.2d 394 (8th Cir. 1961), involved neither a resident nor a hospital. Moreover, *St. Luke's Hospital Ass'n v. United States*, 212 F.Supp. 387 (N.D.

Second Opp'n Mem. at 5-13; 44-52.). The evidence, however, contradicts the Government's contention. (*See, e.g.*, Carlson Aff. Ex. 2 at 40; Ex. 3 at 102103; Ex. 7 at 85, 87, 106; Ex. 12 at 73, 90.)

The University faculty and program directors interviewed candidates and selected residents for its residency programs. (*See, e.g., id.* Ex. 9 at 58-59; Ex. 12 at 64-65, 93; Ex. 17 at 52; Ex. 18 at 44-45; Ex. 25 at ¶ 4; Ex. 19 at ¶ 3; Ex. 20 at ¶ 3; Ex. 26 at ¶ 4.) In addition, the University had affiliation agreements with certain hospitals in Minnesota at which residents could perform their residencies. (*See, e.g.*, Pahl Decl. Tab 2 at Ex. 114). These hospitals had supervising physicians who were appointed to the University faculty and were responsible for "teaching, supervising and evaluating the performance of [the] residents." (*Id.* at UM 02695).

Notably, residents signed residency agreements with the University for each year of the residency program. (Carlson Aff. Ex. 4 at 97, Govt. Exs. 67-69;

[Footnote continued from previous page]

Ohio 1962), *rev'd on other grounds*, 333 F.2d 157 (6th Cir. 1964); *Boston Medical Center Corp.*, 330 NLRB 152, 1999 WL 1076118 (1999), and *Rockswold v. United States*, 471 F.Supp. 1385 (D. Minn. 1979), actually support the University's position because the faculty physicians supervised and controlled the residents. Finally, the Government refers to a medical malpractice case, in which the court found that "as employer of the resident, Ramsey Hospital clearly exercised legal control over Dr. Lisita and was liable for her negligence." *Dang v. St. Paul Ramsey Med. Ctr.*, 490 N.W.2d 653, 657 (Minn. Ct. App. 1992). However, the University was not a party in that case and therefore did not participate in the parties' stipulation that the resident was an employee of Ramsey Hospital. *Id.* at 656.

Ex. 25 at ¶ 4, Ex. C at UM 03286.) The residency agreement provided that the resident would "accept the duties, responsibilities, and rotations *assigned by the program director* or designee[;] . . . participate fully in the educational and scholarly activities of the residency program[;] . . . [and] provide safe, effective, and compassionate care of patients *under faculty supervision.*"[10] (*Id.* Ex. 4, Govt. Ex. 67 at UM 06723-24 (emphases added).) The University also paid the residents' stipends and benefits, which included malpractice insurance.[11] (*Id.* at UM 06724.) In addition, the University, not the hospitals, had the power to suspend or terminate a resident from a residency program.[12] (*Id.* at UM

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[10] An affiliated hospital's policies did not dictate how the University's residents should be taught while they were at the hospital. (Pahl Decl. Tab 1 at 76.)

[11] The Government contends that the trial proceeding in a malpractice case against a former resident "demonstrates that residents were not University employees." (*See* Def.'s Second Opp'n Mem. at 12.) The Court disagrees. Although the University's counsel in that malpractice action stated in a letter that residents were "students" and not University "employees," he did not contend that residents were hospital employees. (Pahl Decl. Tab 20 at Ex. 176.) Rather, he acknowledged that the University provides insurance coverage for the residents and was "responsible" for them. (*Id.*) Notably, no hospital was named as a defendant in that malpractice action, and the University's counsel represented both the University and the resident. (*Id.* at Ex. 175.)

[12] The Court notes that in cases where a resident's conduct threatened the safety or welfare of a patient, an affiliated hospital had the limited power to "suspend" the resident's participation at the hospital. (Carlson Aff. Ex. 1, Govt. Ex. 114 at UM 2696; Ex. 8, Govt. Ex. 113 at UM12591-92.)

06725-26.) In essence, the residency agreement was an employment agreement between the University and the residents. Thus, the University contractually retained the right to control the residents.

The Government, however, contends that the hospitals benefited economically from the residents' services, whereas, the University did not receive any benefit or services from the residents.[13] (Def.'s Second Opp'n Mem. at 10.) This argument ignores the crucial fact that the University is a nonprofit organization; its purpose and function is medical education. The University benefits when the residents complete the residency program because it has fulfilled its educational mission of preparing residents to practice in a medical specialty. The Government also argues that the residents' stipends were compensation for services. (*Id.* at 11.) But, the question of whether the residents' services are performed in the "employ" of the University "depends not on the nature of stipends but on the nature of the residents' relationship with the University." *Apfel*, 151 F.3d at 748 n. 9.

[Footnote continued from previous page]

Nonetheless, the University had the final say as to whether a resident would be disciplined or dismissed from the program. (*Id.* Ex. 4, Govt. Ex. 67 at UM 06725-26.)

[13] The Government also argues that the hospitals really paid the residents' stipends and benefits because the hospitals reimbursed the University. (Def.'s Second Opp'n Mem. at 10-11.) The hospitals, however, did not completely reimburse the University. (*See* Carlson Aff. Ex. 13 at 55; Ex. 24 at ¶¶ 3-4.) Moreover, the ultimate responsibility of paying the residents' stipends and benefits remained with the University.

Program directors, not the hospitals, were responsible for determining the residents' rotation schedules. (Carlson Aff. Ex. 4 at 103; Ex. 5 at 42; Ex. 6 at 109-11; Ex. 7 at 85-87; Ex. 9 at 18; Ex. 12 at 90; Ex. 17 at 54, 68.) Moreover, there is no evidence that the hospitals ever "hired" or "fired" residents; rather, residents enrolled in the University's residency program and were assigned to "rotations"—which took them to the affiliated hospitals—pursuant to a written curriculum that the program director of the given residency program established. (*Id.* Ex. 17 at 67; Ex. 19 at ¶ 3; Ex. 20 at ¶ 3; Ex. 26 at ¶ 4.) The Government, however, argues that the hospitals directed the residents through attending physicians. (Def.'s Second Opp'n Mem. at 7-8, 9-10.) But, the attending physicians who taught and supervised the residents had an academic appointment at the University.[14] (Carlson Aff. Ex. 1, Govt. Ex. 106 at FV 001743; Ex. 2 at 40; Ex. 3 at 102-03; Ex. 6 at 120-30; Ex. 7 at 85, 87, 106; Ex. 8 at 79; Ex. 9 at 7, 15; Ex. 12 at 66, 73, 90; Ex. 14 at 44; Ex. 17 at 66.) In other words, the physicians involved in the University residency program held faculty appointments and acted as agents of the University in the administration of the program. Thus, residents

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[14] The Government cites to a Texas malpractice case, in which the court held that a resident was not an employee of the sponsoring institution because he was a "borrowed employee" of a participating institution at which his services were performed. *St. Joseph's Hosp. v. Wolff*, 94 S.W.3d 513, 542-44 (Tex. 2002). The Court is not persuaded by that decision and agrees with the dissenting opinion which concluded that the resident was employed by the sponsoring institution because it had contractually retained control over him. *Id.* at 545-50.

learned how to care for patients under the supervision and control of the University-faculty physicians. (*Id.* Ex. 7 at 112-13; Ex. 9 at 14-15, 75-76; Ex. 14 at 75-76.) Based on the foregoing, the Court finds that the residents' services were performed in the "employ" of the University.

B. Student Status

The final issue is whether the residents are students. The statutory test is whether the individual was "enrolled and regularly attending classes" at the University. *See* 26 U.S.C. § 3121(b)(10). In particular, "[a]n employee who performs services in the employ of a school, college, or university, as an incident to and for the purpose of pursuing a course of study" is deemed to be a student. 26 C.F.R. § 31.3121(b)(10)-2(c) (Pre-4/1/05); *see also Apfel*, 151 F.3d at 748 (stating that an analysis of student status requires "a case-by-case examination" to determine whether the resident's relationship with the organization was "*primarily for educational purposes or primarily to earn a living*") (emphasis added).

1. "Enrolled" in a residency program

The record shows that the residents were enrolled at the University. (Carlson Aff. Ex. 3, Govt. Ex. 32 at UM 03011 ("All residents and fellows are formally enrolled as students" at the University, "are automatically registered each semester for their Medical School training course . . . [and] [f]ormal registration at the University of Minnesota Medical School is a requirement of our training programs"); Ex. 4 at 13; Ex. 11 at 7-9; 22; Ex. 12 at 36; Ex. 18 at 17 (departments within medical schools enroll residents).) The Government, however, argues that the residents applied to a residency program through

the National Resident Matching Program ("NRMP") and therefore the enrollment at the University was meaningless. (Def.'s Second Opp'n Mem. at 13.) But, "the NRMP is not an application service or job placement service. Applicants must apply directly to residency programs in addition to registering for the Match." *See* http://www.nrmp.org/res_match/index.html (last visited March 28, 2008). Consequently, applicants have to apply to the residency programs of their choice using the method accepted by the program. Most programs at the University participate in the Electronic Residency Application Service ("ERAS"), a service that transmits residency applications, letters of recommendation, medical-student-performance evaluations, transcripts, and other supporting credentials to the residency programs through the Internet. (*See* Pahl Decl. Tab 9 at 9798; *see also* http://www.aamc.org/audienceeras.htm (last visited March 28, 2008).) The University reviews the applications; applicants are then interviewed by the program directors and faculty physicians. (*See, e.g.*, Carlson Aff. Ex. 9 at 58-59; Ex. 12 at 64-65, 93; Ex. 17 at 52; Ex. 18 at 44-45; Ex. 25 at ¶ 4; Ex. 19 at ¶ 3; Ex. 20 at ¶ 3; Ex. 26 at ¶ 4.) Indeed, the program directors have the ultimate authority in determining which applicants it intends to admit and in what order of preference. (*Id.* Ex. 20 at ¶ 3.) The University's decision and the applicant's preference are then "matched." (Pl.'s Reply Mem. at 12-13, n. 20.) Finally, residents paid tuition of $1,200 for the relevant time period, which was deducted from the residents' paychecks during their

academic year.[15] (Carlson Aff. Ex. 13 at 16, 29, 36; Ex. 18, Govt. Ex. 64 at UM 03099.) Thus, the residents were clearly enrolled at the University.

2. "Regularly Attending Classes"

The crux of the Government's argument is that the residents were not students who regularly attended classes, but were physicians who worked in hospitals. (Def.'s Second Opp'n Mem. at 13-29.) The record, however, establishes that the clinical setting is the classroom for residents. Indeed, "[t]he transition between medical school and residency is a transition from more book learning to more hands-on learning" and even though residents have received medical degrees and have knowledge about illnesses and treatments, they have not fully learned how to safely perform medical procedures on patients until after they have completed their residency program. (*See* Carlson Aff. Ex. 10 at 83; Ex. 18 at 48.) Simply put, the educational aspect of the University's residency program necessarily includes learning how to safely care for patients. Thus, the principal classroom for residents must be the clinical setting

[15] The Government argues that the residents were not enrolled at the University because the hospitals paid the residents' purported tuition by reimbursing the University for the residents' stipends. (Def.'s Second Opp'n Mem. at 19-23.) That the hospital reimbursed the University for the residents' stipends does not mean that the residents were not enrolled in a residency program at the University. *See Mayo I*, 282 F.Supp.2d at 1002, 1015-16 (finding that residents were enrolled despite the fact that they did not pay tuition to participate in a residency or fellowship program.) Regardless, the other factors support a finding that the residents were enrolled at the University.

because they learn by caring for patients in a medical specialty under the supervision of a University-faculty member.

Each year, residents had 13 four-week blocks called "rotations," a term often used interchangeably with "course."[16] (*Id.* Ex. 3 at 29-30; Ex. 4 at 16; Ex. 6 at 21.) Residency courses are listed in the University's electronic catalog, which describes the learning objectives of the program, the required conferences and reading, and the subject matter to be covered in a residency program through a schedule of rotations. (*Id.* Ex. 11 at 18-19; *see, e.g.*, http://www.medres.umn.edu/medres/program/rotations/gastroenterology.html (last visited March 28, 2008).) Rotations covered a variety of medicine-related topics and each had a written curriculum. (*See, e.g.*, Carlson Aff. Ex. 4 at Govt. Ex. 23, Ex. 6 at UM 06013-6112.) Furthermore, residents regularly attended conferences and lectures throughout the week. (*Id.* Ex. 1 at 13; Ex. 2 at 15, 34, 59, Ex. 3 at 71-72; 83, Ex. 4 at 46-55, 63-64, Govt. Ex. 35 at UM 022967 (conferences include Morning Report with Faculty, Morbidity and Mortality, Weekly Grand Rounds, Core Conferences, Journal Club, and Seminars).) Residents also took exams, including an "in-training" exam to identify areas of weakness, and other tests while on certain rotations. (*Id.* Ex. 2 at 52; Ex. 3 at 37-38; Ex. 4 at 18-19; Ex. 6 at 72-74; Ex. 10 at 69-70; Ex. 18 at 18-19.) A resident's performance in each subject-matter rotation was

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[16] Program coordinators at the University registered residents for courses and the residents received credits. (Carlson Aff. Ex. 5 at 18, 26, 28, Ex. 11 at 8, 12, 14, 17-19, 22, Ex. 17 at 65.)

evaluated, graded, and recorded on the resident's transcript.[17] (*Id.* Ex. 11 at 6-7, Govt. Ex. 139 at UM 2940-42; Ex. 4, Govt. Ex. 67 at UM 06725.) Based on the foregoing, the Court finds that the University residents were "regularly attending classes."

3. "Incident to and for the Purpose of Pursuing a Course of Study"

The Government argues that the residents' services were not "incident to and for the purpose of pursuing a course of study" because the hospitals paid the residents to work long hours taking care of patients. (Def.'s Second Opp'n Mem. at 27-28.) It further contends that the "residents provided patient-care services when education was minimal or nonexistent." (*Id.* at 28.) The Court disagrees. The primary purpose of the University's residency program is educational. (*See, e.g.*, Carlson Aff. Ex. 19 at 94 ("residency program is there to meet the educational needs of the resident, not the service needs of the hospitals"); Ex. 7 at 99, 116; Ex. 8 at 57-58, Govt. Ex. 155 at 1, 10-11.) Residents spent the majority of their time learning how to care for patients under the watchful eye of a faculty physician. (*Id.* Ex. 3 at 30, 83; Ex. 12 at 36-37.) Indeed, the clinical setting was the principal classroom for residents because this was where they

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[17] The University may require a resident to repeat some or all of a rotation if the student failed to perform adequately during a rotation. (Carlson Aff. Ex. 6 at 76-77, Ex. 15 at 8-11, Ex. 17 at 66.) In general, the University considers residency a pass/fail endeavor. (*Id.* Ex. 12 at 19, Ex. 11 at 19-21.) Upon completion of the residency program, residents received diplomas or certificates of completion from the University at a graduation ceremony. (*Id.* Ex. 3 at 45-46, Ex. 10 at 80-81, Ex. 11 at 8-9.)

learned how to provide patient care. As discussed above, residents applied to and enrolled in residency programs at the University. The residents' primary purpose for enrolling in a residency program at the University was educational—to gain the knowledge and skill necessary to practice in a specialty area of medicine. (*See, e.g., id.* Ex. 3 at 30-31.) The goal of providing educational experiences to the residents in a clinical setting is precisely the purpose behind the affiliation agreements. (*See, e.g.*, Pahl Decl. Tab 2, Govt. Ex. 114.) Further, the record establishes that the hospitals understood that the residents were there to learn because the faculty physicians "could [have] easily provide[d] [patient-care] services in a more efficient and quicker fashion if they didn't have residents." (Carlson Aff. Ex. 9 at 28.) Accordingly, the Court finds that the patient-care services provided by residents in the University's residency programs were incidental to and for the purpose of pursuing a course of study in postgraduate medical education.

CONCLUSION

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS ORDERED** that Plaintiff's Motion for Summary Judgment (Doc. No. 25) is **GRANTED IN PART** as follows:

1. Plaintiff's Motion is **GRANTED** as to Count One of its Complaint; Plaintiff is entitled to a refund of FICA taxes withheld and paid in the amount of $1,094,803.92, plus interest; and
2. Counts Two, Three, and Four of Plaintiff's Complaint are **DISMISSED WITHOUT PREJUDICE**

LET JUDGMENT BE ENTERED ACCORDINGLY.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-3242

Mayo Foundation for Medical Education and Research and Mayo Clinic,

Appellees

v.

United States of America,

Appellant

No: 08-2193

Regents of the University of Minnesota,

Appellee

v.

United States of America,

Appellant

Appeal from U.S. District Court for the District of Minnesota – Minneapolis

(0:06-cv-05059-RHK)

(0:06-cv-05084-RHK)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Melloy and Judge Shepherd would grant the petition for rehearing en banc.

Judge Murphy did not participate in the consideration or decision of this matter.

September 17, 2009

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX E

26 U.S.C. § 3121 provides in relevant part:

§ 3121. Definitions.

(a) Wages.—For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash

* * *

(b) Employment.—For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 233 of the

Social Security Act; except that such term shall not include—

* * *

(10) service performed in the employ of—

(A) a school, college, or university, or

(B) an organization described in section 509(a)(3) if the organization is organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university and is operated, supervised, or controlled by or in connection with such school, college, or university, unless it is a school, college, or university of a State or a political subdivision thereof and the services performed in its employ by a student referred to in section 218(c)(5) of the Social Security Act are covered under the agreement between the Commissioner of Social Security and such State entered into pursuant to section 218 of such Act;

if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university;

* * *

APPENDIX F

Treasury Regulations on Employment Tax (26 C.F.R.), as in effect for services performed prior to April 1, 2005:

§ 31.3121(b)(10)-2. Services performed by certain students in the employ of a school, college, or university, or of a nonprofit organization auxiliary to a school, college, or university.—

(a)(1) Services performed in the employ of a school, college, or university (whether or not such organization is exempt from income tax) is excepted from employment, if the services are performed by a student who is enrolled and is regularly attending classes at such school, college, or university.

* * *

(b) For purposes of this exception, the amount of remuneration for services performed by the employee in the calendar quarter, the type of services performed by the employee, and the place where the services are performed are immaterial. The statutory tests are (1) the character of the organization in the employ of which the services are performed as a school, college, or university, * * * and (2) the status of the employee as a student enrolled and regularly attending classes at the school, college, or university by which he is employed or with which his employer is affiliated.

(c) The status of the employee as a student performing the services shall be determined on the

basis of the relationship of such employee with the organization for which the services are performed. An employee who performs services in the employ of a school, college, or university, as an incident to and for the purpose of pursuing a course of study at such school, college, or university has the status of a student in the performance of such services.

* * *

(d) The term "school, college, or university" within the meaning of this exception is to be taken in its commonly or generally accepted sense.

* * *

APPENDIX G

Treasury Regulations on Employment Tax (26 C.F.R.), as in effect for services performed on or after April 1, 2005:

§ 31.3121(b)(10)-2. Services performed by certain students in the employ of a school, college, or university, or of a nonprofit organization auxiliary to a school, college, or university.—

(a) General rule. (1) Services performed in the employ of a school, college, or university within the meaning of paragraph (c) of this section (whether or not the organization is exempt from income tax) are excepted from employment, if the services are performed by a student within the meaning of paragraph (d) of this section who is enrolled and is regularly attending classes at the school, college, or university.

(2) Services performed in the employ of an organization which is—

(i) Described in section 509(a)(3) and § 1.509(a)-4;

(ii) Organized, and at all times thereafter operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university within the meaning of paragraph (c) of this section; and

(iii) Operated, supervised, or controlled by or in connection with the school, college, or university; are excepted from employment, if the services are

performed by a student who is enrolled and regularly attending classes within the meaning of paragraph (d) of this section at the school, college, or university. The preceding sentence shall not apply to services performed in the employ of a school, college, or university of a State or a political subdivision thereof by a student referred to in section 218(c)(5) of the Social Security Act (42 U.S.C. 418(c)(5)) if such services are covered under the agreement between the Commissioner of Social Security and such State entered into pursuant to section 218 of such Act. For the definitions of "operated, supervised, or controlled by", "supervised or controlled in connection with", and "operated in connection with", see paragraphs (g), (h), and (i), respectively, of § 1.509(a)-4.

(b) Statutory tests. For purposes of this section, if an employee has the status of a student within the meaning of paragraph (d) of this section, the amount of remuneration for services performed by the employee, the type of services performed by the employee, and the place where the services are performed are not material. The statutory tests are:

(1) The character of the organization in the employ of which the services are performed as a school, college, or university within the meaning of paragraph (c) of this section, or as an organization described in paragraph (a)(2) of this section, and

(2) The status of the employee as a student enrolled and regularly attending classes within the meaning of paragraph (d) of this section at the school, college, or university within the meaning of paragraph (c) of this section by which the employee is employed or with which the employee's employer is

affiliated within the meaning of paragraph (a)(2) of this section.

(c) School, College, or University. An organization is a school, college, or university within the meaning of section 3121(b)(10) if its primary function is the presentation of formal instruction, it normally maintains a regular faculty and curriculum, and it normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on. See section 170(b)(1)(A)(ii) and the regulations thereunder.

(d) Student Status—general rule. Whether an employee has the status of a student performing the services shall be determined based on the relationship of the employee with the organization employing the employee. In order to have the status of a student, the employee must perform services in the employ of a school, college, or university within the meaning of paragraph (c) of this section at which the employee is enrolled and regularly attending classes in pursuit of a course of study within the meaning of paragraphs (d)(1) and (2) of this section. In addition, the employee's services must be incident to and for the purpose of pursuing a course of study within the meaning of paragraph (d)(3) of this section at such school, college, or university. An employee who performs services in the employ of an affiliated organization within the meaning of paragraph (a)(2) of this section must be enrolled and regularly attending classes at the affiliated school, college, or university within the meaning of paragraph (c) of this section in pursuit of a course of study within the meaning of paragraphs (d)(1) and (2) of this section. In addition, the employee's services must be incident to and for the purpose of

pursuing a course of study within the meaning of paragraph (d)(3) of this section at such school, college, or university.

(1) Enrolled and regularly attending classes. An employee must be enrolled and regularly attending classes at a school, college, or university within the meaning of paragraph (c) of this section at which the employee is employed to have the status of a student within the meaning of section 3121(b)(10). An employee is enrolled within the meaning of section 3121(b)(10) if the employee is registered for a course or courses creditable toward an educational credential described in paragraph (d)(2) of this section. In addition, the employee must be regularly attending classes to have the status of a student. For purposes of this paragraph (d)(1), a class is an instructional activity led by a faculty member or other qualified individual hired by the school, college, or university within the meaning of paragraph (c) of this section for identified students following an established curriculum. Traditional classroom activities are not the sole means of satisfying this requirement. For example, research activities under the supervision of a faculty advisor necessary to complete the requirements for a Ph.D. degree may constitute classes within the meaning of section 3121(b)(10). The frequency of these and similar activities determines whether an employee may be considered to be regularly attending classes.

(2) Course of study. An employee must be pursuing a course of study in order to have the status of a student. A course of study is one or more courses the completion of which fulfills the requirements necessary to receive an educational credential granted by a school, college, or university

within the meaning of paragraph (c) of this section. For purposes of this paragraph, an educational credential is a degree, certificate, or other recognized educational credential granted by an organization described in paragraph (c) of this section. A course of study also includes one or more courses at a school, college or university within the meaning of paragraph (c) of this section the completion of which fulfills the requirements necessary for the employee to sit for an examination required to receive certification by a recognized organization in a field.

(3) Incident to and for the purpose of pursuing a course of study.

(i) General rule. An employee's services must be incident to and for the purpose of pursuing a course of study in order for the employee to have the status of a student. Whether an employee's services are incident to and for the purpose of pursuing a course of study shall be determined on the basis of the relationship of the employee with the organization for which such services are performed as an employee. The educational aspect of the relationship between the employer and the employee, as compared to the service aspect of the relationship, must be predominant in order for the employee's services to be incident to and for the purpose of pursuing a course of study. The educational aspect of the relationship is evaluated based on all the relevant facts and circumstances related to the educational aspect of the relationship. The service aspect of the relationship is evaluated based on all the relevant facts and circumstances related to the employee's employment. The evaluation of the service aspect of the relationship is not affected by the fact that the services performed by the employee may have an educational, instructional, or training

aspect. Except as provided in paragraph (d)(3)(iii) of this section, whether the educational aspect or the service aspect of an employee's relationship with the employer is predominant is determined by considering all the relevant facts and circumstances. Relevant factors in evaluating the educational and service aspects of an employee's relationship with the employer are described in paragraphs (d)(3)(iv) and (v) of this section respectively. There may be facts and circumstances that are relevant in evaluating the educational and service aspects of the relationship in addition to those described in paragraphs (d)(3)(iv) and (v) of this section.

(ii) Student status determined with respect to each academic term. Whether an employee's services are incident to and for the purpose of pursuing a course of study is determined separately with respect to each academic term. If the relevant facts and circumstances with respect to an employee's relationship with the employer change significantly during an academic term, whether the employee's services are incident to and for the purpose of pursuing a course of study is reevaluated with respect to services performed during the remainder of the academic term.

(iii) Full-time employee. The services of a full-time employee are not incident to and for the purpose of pursuing a course of study. The determination of whether an employee is a full-time employee is based on the employer's standards and practices, except regardless of the employer's classification of the employee, an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee. An employee's normal work schedule is not affected by increases in hours worked caused by work demands unforeseen at

the start of an academic term. However, whether an employee is a full-time employee is reevaluated for the remainder of the academic term if the employee changes employment positions with the employer. An employee's work schedule during academic breaks is not considered in determining whether the employee's normal work schedule is 40 hours or more per week. The determination of an employee's normal work schedule is not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect.

(iv) Evaluating educational aspect. The educational aspect of an employee's relationship with the employer is evaluated based on all the relevant facts and circumstances related to the educational aspect of the relationship. The educational aspect of an employee's relationship with the employer is generally evaluated based on the employee's course workload. Whether an employee's course workload is sufficient in order for the employee's employment to be incident to and for the purpose of pursuing a course of study depends on the particular facts and circumstances. A relevant factor in evaluating an employee's course workload is the employee's course workload relative to a full-time course workload at the school, college or university within the meaning of paragraph (c) of this section at which the employee is enrolled and regularly attending classes.

(v) Evaluating service aspect. The service aspect of an employee's relationship with the employer is evaluated based on the facts and circumstances related to the employee's employment. Services of an employee with the status of a full-time employee within the meaning of paragraph (d)(3)(iii) of this section are not incident to and for the purpose of pursuing a course of study. Relevant factors in

evaluating the service aspect of an employee's relationship with the employer are described in paragraphs (d)(3)(v)(A), (B), and (C) of this section.

(A) Normal work schedule and hours worked. If an employee is not a full-time employee within the meaning of paragraph (d)(3)(iii) of this section, then the employee's normal work schedule and number of hours worked per week are relevant factors in evaluating the service aspect of the employee's relationship with the employer. As an employee's normal work schedule or actual number of hours worked approaches 40 hours per week, it is more likely that the service aspect of the employee's relationship with the employer is predominant. The determination of an employee's normal work schedule and actual number of hours worked is not affected by the fact that some of the services performed by the employee may have an educational, instructional, or training aspect.

(B) Professional employee.

(1) If an employee has the status of a professional employee, then that suggests the service aspect of the employee's relationship with the employer is predominant. A professional employee is an employee—

(i) Whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education, from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes;

(ii) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(iii) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(2) Licensed, professional employee. If an employee is a licensed, professional employee, then that further suggests the service aspect of the employee's relationship with the employer is predominant. An employee is a licensed, professional employee if the employee is required to be licensed under state or local law to work in the field in which the employee performs services and the employee is a professional employee within the meaning of paragraph (d)(3)(v)(B)(1) of this section.

(C) Employment Benefits. Whether an employee is eligible to receive one or more employment benefits is a relevant factor in evaluating the service aspect of an employee's relationship with the employer. For example, eligibility to receive vacation, paid holiday, and paid sick leave benefits; eligibility to participate in a retirement plan or arrangement described in sections 401(a), 403(b), or 457(a); or eligibility to receive employment benefits such as reduced tuition (other than qualified tuition reduction under section 117(d)(5) provided to a teaching or research assistant who is a graduate student), or benefits under sections 79 (life insurance), 127 (qualified educational assistance), 129 (dependent care assistance programs), or 137 (adoption assistance) suggest that the service aspect of an employee's relationship with the employer is

predominant. Eligibility to receive health insurance employment benefits is not considered in determining whether the service aspect of an employee's relationship with the employer is predominant. The weight to be given the fact that an employee is eligible for a particular employment benefit may vary depending on the type of benefit. For example, eligibility to participate in a retirement plan is generally more significant than eligibility to receive a dependent care employment benefit. Additional weight is given to the fact that an employee is eligible to receive an employment benefit if the benefit is generally provided by the employer to employees in positions generally held by non-students. Less weight is given to the fact that an employee is eligible to receive an employment benefit if eligibility for the benefit is mandated by state or local law.

(e) Examples. The following examples illustrate the principles of paragraphs (a) through (d) of this section:

Example 1. (i) Employee C is employed by State University T to provide services as a clerk in T's administrative offices, and is enrolled and regularly attending classes at T in pursuit of a B.S. degree in biology. C has a course workload during the academic term which constitutes a full-time course workload at T. C is considered a part-time employee by T during the academic term, and C's normal work schedule is 20 hours per week, but occasionally due to work demands unforeseen at the start of the academic term C works 40 hours or more during a week. C is compensated by hourly wages, and receives no other compensation or employment benefits.

(ii) In this example, C is employed by T, a school, college, or university within the meaning of paragraph (c) of this section. C is enrolled and regularly attending classes at T in pursuit of a course of study. C is not a full-time employee based on T's standards, and C's normal work schedule does not cause C to have the status of a full-time employee, even though C may occasionally work 40 hours or more during a week due to unforeseen work demands. C's part-time employment relative to C's full-time course workload indicates that the educational aspect of C's relationship with T is predominant. Additional facts supporting this conclusion are that C is not a professional employee, and C does not receive any employment benefits. Thus, C's services are incident to and for the purpose of pursuing a course of study. Accordingly, C's services are excepted from employment under section 3121(b)(10).

Example 2. (i) Employee D is employed in the accounting department of University U, and is enrolled and regularly attending classes at U in pursuit of an M.B.A. degree. D has a course workload which constitutes a half-time course workload at U. D is considered a full-time employee by U under U's standards and practices.

(ii) In this example, D is employed by U, a school, college, or university within the meaning of paragraph (c) of this section. In addition, D is enrolled and regularly attending classes at U in pursuit of a course of study. However, because D is considered a full-time employee by U under its standards and practices, D's services are not incident to and for the purpose of pursuing a course of study. Accordingly, D's services are not excepted from employment under section 3121(b)(10).

Example 3. (i) The facts are the same as in Example 2, except that D is not considered a full-time employee by U, and D's normal work schedule is 32 hours per week. In addition, D's work is repetitive in nature and does not require the consistent exercise of discretion and judgment, and is not predominantly intellectual and varied in character. However, D receives vacation, sick leave, and paid holiday employment benefits, and D is eligible to participate in a retirement plan maintained by U described in section 401(a).

(ii) In this example, D's half-time course workload relative to D's hours worked and eligibility for employment benefits indicates that the service aspect of D's relationship with U is predominant, and thus D's services are not incident to and for the purpose of pursuing a course of study. Accordingly, D's services are not excepted from employment under section 3121(b)(10).

Example 4. (i) Employee E is employed by University V to provide patient care services at a teaching hospital that is an unincorporated division of V. These services are performed as part of a medical residency program in a medical specialty sponsored by V. The residency program in which E participates is accredited by the Accreditation Counsel for Graduate Medical Education. Upon completion of the program, E will receive a certificate of completion, and be eligible to sit for an examination required to be certified by a recognized organization in the medical specialty. E's normal work schedule, which includes services having an educational, instructional, or training aspect, is 40 hours or more per week.

(ii) In this example, E is employed by V, a school, college, or university within the meaning of paragraph (c) of this section. However, E's normal work schedule calls for E to perform services 40 or more hours per week. E is therefore a full-time employee, and the fact that some of E's services have an educational, instructional, or training aspect does not affect that conclusion. Thus, E's services are not incident to and for the purpose of pursuing a course of study. Accordingly, E's services are not excepted from employment under section 3121(b)(10) and there is no need to consider other relevant factors, such as whether E is a professional employee or whether E is eligible for employment benefits.

Example 5. (i) Employee F is employed in the facilities management department of University W. F has a B.S. degree in engineering, and is completing the work experience required to sit for an examination to become a professional engineer eligible for licensure under state or local law. F is not attending classes at W.

(ii) In this example, F is employed by W, a school, college, or university within the meaning of paragraph (c) of this section. However, F is not enrolled and regularly attending classes at W in pursuit of a course of study. F's work experience required to sit for the examination is not a course of study for purposes of paragraph (d)(2) of this section. Accordingly, F's services are not excepted from employment under section 3121(b)(10).

Example 6. (i) Employee G is employed by Employer X as an apprentice in a skilled trade. X is a subcontractor providing services in the field in which G wishes to specialize. G is pursuing a certificate in the skilled trade from Community

College C. G is performing services for X pursuant to an internship program sponsored by C under which its students gain experience, and receive credit toward a certificate in the trade.

(ii) In this example, G is employed by X. X is not a school, college or university within the meaning of paragraph (c) of this section. Thus, the exception from employment under section 3121(b)(10) is not available with respect to G's services for X.

Example 7. (i) Employee H is employed by a cosmetology school Y at which H is enrolled and regularly attending classes in pursuit of a certificate of completion. Y's primary function is to carry on educational activities to prepare its students to work in the field of cosmetology. Prior to issuing a certificate, Y requires that its students gain experience in cosmetology services by performing services for the general public on Y's premises. H is scheduled to work and in fact works significantly less than 30 hours per week. H's work does not require knowledge of an advanced type in a field of science or learning, nor is it predominantly intellectual and varied in character. H receives remuneration in the form of hourly compensation from Y for providing cosmetology services to clients of Y, and does not receive any other compensation and is not eligible for employment benefits provided by Y.

(ii) In this example, H is employed by Y, a school, college or university within the meaning of paragraph (c) of this section, and is enrolled and regularly attending classes at Y in pursuit of a course of study. Factors indicating the educational aspect of H's relationship with Y is predominant are that H's hours worked are significantly less than 30 per week, H is not a professional employee, and H is

not eligible for employment benefits. Based on the relevant facts and circumstances, the educational aspect of H's relationship with Y is predominant. Thus, H's services are incident to and for the purpose of pursuing a course of study. Accordingly, H's services are excepted from employment under section 3121(b)(10).

Example 8. (i) Employee J is a graduate teaching assistant at University Z. J is enrolled and regularly attending classes at Z in pursuit of a graduate degree. J has a course workload which constitutes a full-time course workload at Z. J's normal work schedule is 20 hours per week, but occasionally due to work demands unforeseen at the start of the academic term J works more than 40 hours during a week. J's duties include grading quizzes and exams pursuant to guidelines set forth by the professor, providing class and laboratory instruction pursuant to a lesson plan developed by the professor, and preparing laboratory equipment for demonstrations. J receives a cash stipend and employment benefits in the form of eligibility to make elective employee contributions to an arrangement described in section 403(b). In addition, J receives qualified tuition reduction benefits within the meaning of section 117(d)(5) with respect to the tuition charged for the credits earned for being a graduate teaching assistant.

(ii) In this example, J is employed by Z, a school, college, or university within the meaning of paragraph (c) of this section, and is enrolled and regularly attending classes at Z in pursuit of a course of study. J's full-time course workload relative to J's normal work schedule of 20 hours per week indicates that the educational aspect of J's relationship with Z is predominant. In addition, J is not a professional

employee because J's work does not require the consistent exercise of discretion and judgment in its performance. On the other hand, the fact that J receives employment benefits in the form of eligibility to make elective employee contributions to an arrangement described in section 403(b) indicates that the employment aspect of J's relationship with Z is predominant. Balancing the relevant facts and circumstances, the educational aspect of J's relationship with Z is predominant. Thus, J's services are incident to and for the purpose of pursuing a course of study. Accordingly, J services are excepted from employment under section 3121(b)(10).

(f) Effective date. Paragraphs (a), (b), (c), (d) and (e) of this section apply to services performed on or after April 1, 2005.

(g) *For provisions relating to domestic service performed by a student in a local college club, or local chapter of a college fraternity or sorority, see* § 31.3121(b)(2)-1.

OPPOSITION BRIEF

No. 09-837

In the Supreme Court of the United States

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Pursuant to 26 U.S.C. 3121(b)(10), "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university" is exempt from tax under the Federal Insurance Contributions Act (FICA), 26 U.S.C. 3101 *et seq.* The question presented is as follows:

Whether the Department of the Treasury validly amended its regulations, 26 C.F.R. 31.3121(b)(10)-2(d)(3)(iii), to provide that full-time employees are not "students" for purposes of the FICA tax exemption contained in 26 U.S.C. 3121(b)(10).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 568 F.3d 675. The opinion of the district court in *Mayo Foundation for Medical Education & Research* v. *United States* (Pet. App. 20a-46a) is reported at 503 F. Supp. 2d 1164. The opinion of the district court in *Regents of the University of Minnesota* v. *United States* (Pet. App. 47a-65a) is unreported but is available at 2008 WL 906799.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2009. A petition for rehearing was denied on September 17, 2009 (Pet. App. 66a-67a). On December 7, 2009, Justice Alito extended the time within which to

file a petition for a writ of certiorari to and including January 15, 2010, and the petition was filed on January 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the validity of a recent amendment to regulations of the Department of the Treasury governing the "student" exception to coverage under the Federal Insurance Contributions Act (FICA), 26 U.S.C. 3101 *et seq.* FICA requires employers and employees to pay taxes on "wages" from "employment" in order to fund the Social Security and Medicare programs. 26 U.S.C. 3101, 3102, 3111. FICA excepts from covered "employment" service performed in the employ of a "school, college, or university" if "such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. 3121(b)(10).

Effective for services performed on or after April 1, 2005, the Treasury Department amended its regulations implementing that "student" exception. T.D. 9167, 2005-1 C.B. 261. As relevant here, the amendment modified the regulations' generally fact-based approach for determining "student" status by adding a proviso that employees who normally work 40 or more hours per week are not "students" eligible for the exemption. 26 C.F.R. 31.3121(b)(10)-2(d)(3)(iii). In the first decision by any court of appeals addressing the issue, the court below upheld the validity of this full-time employee rule. Pet. App. 1a-19a.

1. Petitioners, the Mayo Foundation for Medical Education and Research and the Mayo Clinic (collectively Mayo) and the University of Minnesota (the Uni-

versity) sponsor graduate medical education programs for medical residents and fellows (collectively residents). Residents are physicians who have graduated from medical school but are pursuing further training in a medical specialty or subspecialty by providing medical and patient-care services. Completion of a residency or fellowship program is a prerequisite to sitting for a board examination for certification in a specialty or subspecialty. Pet. App. 2a, 22a & n.2, 48a; 07-3242 Gov't C.A. App. 67.

Residents are assigned to rotations involving the performance of various medical duties in affiliated hospitals and clinics. Under the supervision of staff physicians, who also hold faculty appointments at petitioners' medical schools, residents work between 50 and 80 hours per week treating patients. In addition to their patient-care duties, residents attend lectures, perform research, and participate in "teaching rounds." Residents are compensated by "stipends" that increase with experience. During the second quarter of 2005, those stipends ranged between $41,057 and $55,935 annually for Mayo's residents and between $43,647 and $55,679 (including the resident's share of FICA tax) for the University's residents. Pet. App. 19a, 22a, 48a-49a, 63a; 07-3242 Gov't C.A. App. 71, 72; 08-2193 Gov't C.A. App. 119, 322.

2. The current controversy has its origins in *Minnesota* v. *Apfel*, 151 F.3d 742 (8th Cir. 1998), which involved a dispute between the State of Minnesota and the Social Security Administration (SSA) about whether the University's medical residents were covered by the Social Security Act, 42 U.S.C. 301 *et seq.* The court of appeals in that case held that the residents were not covered, based in part on the conclusion that they qualified for the Social Security Act's "student" exception in 42

U.S.C. 418(c)(5). *Apfel*, 151 F.3d at 747-748. The court rejected the SSA's position that medical residents were categorically ineligible for "student" status. The court reasoned that "[t]he bright-line rule" advocated by the SSA was "inconsistent with the approach set forth" in the SSA's regulation implementing the exception, 20 C.F.R. 404.1028(c), "which contemplate[d] a case-by-case examination" of the "individual's relationship with a school." *Apfel*, 151 F.3d at 748.

After the decision in *Apfel*, Mayo brought suit seeking a refund of FICA taxes it had paid on behalf of its residents, arguing that the residents qualified for the "student" exception to FICA in 26 U.S.C. 3121(b)(10). See *United States* v. *Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997 (D. Minn. 2003) (*Mayo I*). At that time, the Treasury Regulations implementing that exception provided that an employee's status as a "student" should be determined "on the basis of the relationship of such employee with the organization for which the services are performed," and that an employee was a "student" if he performed the services "as an incident to and for the purpose of pursuing a course of study at such school, college, or university." 26 C.F.R. 31.3121(b)(10)-2(c) (2003). The district court in *Mayo I* rejected the government's contention that residents were categorically ineligible for the "student" exception. The court held that, under the Eighth Circuit's decision in *Apfel*, the Treasury Regulations implementing the FICA exception, like the SSA's Social Security Act regulation, should be construed to require a case-by-case examination of "student" status. 282 F. Supp. 2d at 1005-1007. Based on that case-specific examination, the court concluded that Mayo's residents qualified for FICA's "student" exception. *Id.* at 1015-1018.

The Treasury Department subsequently amended its regulations governing FICA's "student" exception to clarify how the exception applies to situations involving on-the-job training, where work and study "are to some extent intermingled." 69 Fed. Reg. 8605 (2004). *Inter alia*, the amended regulations "clarif[y] who is a student enrolled and regularly attending classes for purposes of [S]ection 3121(b)(10)." *Id.* at 8606; see T.D. 9167, *supra*.

The amended regulations, which are effective for services performed on or after April 1, 2005, 26 C.F.R. 31.3121(b)(10)-2(f), retain the general approach of the prior regulations, under which student status depends on "the relationship" between the employee and the employer and is limited to employees who perform services "incident to and for the purpose of pursuing a course of study," 26 C.F.R. 31.3121(b)(10)-2(d)(3)(i). The amended regulations clarify, however, that this standard is satisfied only if "[t]he educational aspect of the relationship between the employer and the employee, as compared to the service aspect," is "predominant," and that "[t]he evaluation of the service aspect of the relationship is not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect." *Ibid.*

The amended regulations further provide that, although an employee's relationship with an employer is generally evaluated based upon all the relevant facts and circumstances, that case-by-case analysis does not apply to "a full-time employee," *i.e.* an employee whose normal work schedule is 40 hours or more per week. 26 C.F.R. 31.3121(b)(10)-2(d)(3)(iii). Instead, the regulations establish a categorical rule that "[t]he services of a full-time employee are not incident to and for the purpose of pursuing a course of study." *Ibid.* The regula-

tions include several examples to illustrate their application, including the example of a medical resident who is normally scheduled to work at least 40 hours per week. The discussion accompanying that example explains that such a resident is a full-time employee and is therefore ineligible for the "student" exception, even though some of the services that he performs have an educational, instructional, or training aspect. 26 C.F.R. 31.3121(b)(10)-2(e), Example 4.

3. After the amended regulations took effect, petitioners brought suits in the District Court for the District of Minnesota, challenging the validity of the regulations and seeking a refund of FICA taxes they had paid for their residents during the second quarter of 2005. The district court struck down the full-time employee rule in Mayo's case (Pet. App. 38a-43a) and then followed that ruling in the University's case (*id.* at 54a).

In its opinion in Mayo's case, the district court disagreed with the government's contention "that the definition of 'student' is ambiguous" and "that a rule categorically denying student status to a full-time employee is a permissible and reasonable interpretation." Pet. App. 38a. The court concluded instead that "[t]he word 'student' is well defined and commonly understood outside the context of the Student Exclusion," noting that the dictionary definition is "an individual who engages in 'study' and is 'enrolled in a class or course in a school, college, or university.'" *Id.* at 39a (quoting *Webster's Third New International Dictionary of the English Language* 2268 (1981)). The court did not take issue with the regulations' longstanding provision that the services must be performed "incident to and for the purpose of pursuing a course of study." *Ibid.* (quoting 26 C.F.R. 31.3121(b)(10)-2(d)(3)(i)). Nor did the court dis-

pute the validity of the amended regulations' clarification that the educational aspect of the relationship between the student and the employer must predominate over the service aspect. *Ibid.*

Instead, the district court observed that "[a] natural reading of the full text in which the term 'student' appears demonstrates that an employee is a 'student' so long as the educational aspect of his service predominates over the service aspect of the relationship with his employer." Pet. App. 39a. The court concluded that "[t]he full-time employee exception arbitrarily narrows this definition by providing that a 'full-time' employee is not a 'student' even if the educational aspect of an employee's service predominates over the service aspect." *Id.* at 40a. Because the court had already decided in *Mayo I* that Mayo's residents qualify as students under the prior regulation, the court ruled that Mayo was entitled to a refund of the FICA taxes at issue. *Id.* at 46a.

In the University's case, the district court noted that it had already ruled, in Mayo's case, that the full-time employee rule is invalid. Pet. App. 54a. The court went on to conclude that the University's residents are "students" "enrolled" (*id.* at 60a-62a) and "regularly attending classes" (*id.* at 62a-64a) who treated patients "incident to and for the purpose of pursuing a course of study" (*id.* at 64a-65a). Accordingly, the court ruled that the University was entitled to a refund of the FICA taxes at issue. *Id.* at 65a.

4. The court of appeals reversed the district court's judgments. Pet. App. 1a-19a. The court of appeals observed that a Treasury Regulation is valid and entitled to deference if the statutory provision that it interprets is "ambiguous with respect to the specific issue" and the regulation "is based on a permissible construction of the

statute." *Id.* at 8a (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984)). The court recognized that "four of [its] sister circuits ha[d] recently declared, in cases arising under the former regulations," that "the student exception statute is unambiguous" and "does not limit the types of services that qualify for the exemption." *Id.* at 9a (quoting *United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1252 (11th Cir. 2007), and citing *United States* v. *Memorial Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27 (2d Cir. 2009), *United States* v. *Detroit Med. Ctr.*, 557 F.3d 412, 417-418 (6th Cir. 2009), and *University of Chi. Hosps.* v. *United States*, 545 F.3d 564, 567 (7th Cir. 2008)). The court observed, however, that, "[v]iewed narrowly," those decisions "held only that the statute *as construed in the prior regulations* precluded the government's contention that payments to medical residents are *categorically* ineligible for the student exception." *Id.* at 9a n.2. The court of appeals emphasized that the courts deciding the prior cases "did not address the validity of the amended regulations," and it stated that petitioners' current challenge to those regulations "raises an entirely different issue." *Ibid.*

To the extent that the other circuits had suggested that any Treasury Regulation clarifying the meaning of the term "student" in Section 3121(b)(10) is necessarily invalid because that term has an established common meaning, the court of appeals rejected that approach. Pet. App. 9a-11a. The court observed that this Court has frequently upheld Treasury Regulations interpreting terms that have a plain or common meaning in other contexts on the ground that their meaning as used in tax statutes is not clear. *Id.* at 11a. The court of appeals noted that Section 3121(b)(10) further requires that the

student be "enrolled and regularly attending classes." *Ibid.* In the court's view, that phrase is susceptible to an interpretation that "limits the student exception to services that are subordinate to the student's educational activities." *Ibid.* Stressing that "words must be construed in context," the court held that "the statute is silent or ambiguous on the question" whether residents working full-time are "student[s]." *Id.* at 12a.

The court of appeals next held that the amended regulations' definition of the term "student" as excluding individuals who work full-time "is a permissible interpretation of the statute." Pet. App. 12a. Examining the history of the FICA exemptions, including the legislative record surrounding their enactment and amendment, the court concluded that the "exceptions were directed to part-time workers," and that "the full-time employee limitation in the amended regulation is [therefore] consistent with the origin and purpose of the student exception." *Id.* at 15a. The court also noted that the Commissioner of Internal Revenue has consistently taken the position that the "student" exception does not encompass full-time employees. *Id.* at 17a. The court further observed that, although the courts in *Apfel* and *Mayo I* had applied the prior "regulation in a contrary manner, * * * the Commissioner responded with amended regulations more specifically articulating the underlying policy." *Ibid.* Relying on this Court's repeated holdings that "agencies may validly amend regulations to respond to adverse judicial decisions, * * * so long as the amended regulation is a permissible interpretation of the statute" (*id.* at 17a-18a), the court of appeals concluded that the amended Treasury Regulations are valid. *Id.* at 19a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Indeed, the court below is the first and only court of appeals to address the validity of the full-time employee rule contained in the amended Treasury Regulations. This Court's review is not warranted.

1. As the court of appeals correctly held (Pet. App. 8a-19a), the amended regulations' full-time employee rule is a permissible interpretation of the "student" exception to FICA tax in 26 U.S.C. 3121(b)(10). The statute does not unambiguously resolve the question whether a full-time worker may qualify as a "student * * * enrolled and regularly attending classes," *ibid.*, and the Treasury Department reasonably resolved that ambiguity by determining that a full-time worker does not qualify, 26 C.F.R. 31.3121(b)(10)-2(d)(3)(iii). The amended regulation is therefore entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See Pet. App. 8a (quoting *Chevron*, 467 U.S. at 842-843); *id.* at 8a-19a (applying *Chevron* to the issue in this case).

First, the statute does not clearly resolve whether a full-time employee may qualify as a "student." See Pet. App. 8a-12a. Although the term can have a broader meaning, the word "student" is most commonly used to refer to a pupil receiving formal instruction in an academic setting, not a full-time employee who learns by doing. See, *e.g.*, *Random House Webster's Unabridged Dictionary* 1888 (2d ed. 2001) ("a person formally engaged in learning, esp. one enrolled in a school or college; pupil"). That understanding is reinforced by the surrounding statutory language, which requires that the individual be "enrolled" at a "school, college, or univer-

sity." 26 U.S.C. 3121(b)(10). And by requiring that the individual be "*regularly* attending classes," *ibid.* (emphasis added), that surrounding language also suggests the appropriateness of a temporal limit on the number of hours that the individual may work. The possibility that the term "student" does not include full-time workers is also supported by the overarching purpose of FICA, because exempting full-time workers from FICA taxes would undermine the statutory goal of collecting contributions during an employee's entire working career in order to fund benefits in retirement.

Second, the Treasury Department's determination that the "student" exception does not apply to full-time employees is reasonable. See Pet. App. 12a-19a. As just discussed, that limitation is consistent with the surrounding statutory language and furthers FICA's underlying goals. Moreover, as the court of appeals observed, the full-time employee limitation "is consistent with the origin and purpose of the student exception." *Id.* at 15a. The legislative record surrounding the enactment and amendment of the FICA exemptions demonstrates that Congress intended to exempt only "part-time" or "intermittent" work, for "nominal" wages, where the attendant loss of benefits is inconsequential and not worth the trouble of administration. See H.R. Rep. No. 728, 76th Cong., 1st Sess. 18 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 19 (1939); see also H.R. Rep. No. 1300, 81st Cong., 1st Sess. 12 (1949); S. Rep. No. 1669, 81st Cong., 2d Sess. 15 (1950). And, as the court of appeals also observed, "the historical record reflects a consistent substantive policy" (Pet. App. 17a) of not extending the exception to full-time employees. See also *Johnson City Med. Ctr.* v. *United States*, 999 F.2d 973 (6th Cir. 1993) (upholding a Revenue Ruling

interpreting the parallel student nurse exception as precluding full-time employment).

2. Contrary to petitioners' contention (Pet. 12-16), the Eighth Circuit's decision in this case—the first and only appellate decision to address the validity of the amended regulations' full-time employee rule—does not conflict with the decision of any other court of appeals.

As the court below explained, the decisions on which petitioners rely for their claim of conflict "did not address the validity of the amended regulations." Pet. App. 9a n.2. See, *e.g.*, *United States* v. *Memorial Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 25 n.2 (2d Cir. 2009) (*Sloan-Kettering*) (noting that, because the amended regulation was not applicable to the tax periods at issue, the court "d[id] not apply or consider it"); *University of Chi. Hosps.* v. *United States*, 545 F.3d 564, 568 (7th Cir. 2008) (noting that "the new regulation is not applicable here"). Instead, those "decisions held only that the statute *as construed in the prior regulations* precluded the government's contention that payments to medical residents [were] *categorically* ineligible for the student exception." Pet. App. 9a n.2. The courts that issued those decisions expressly relied on the fact that the prior regulations mandated a fact-specific, case-by-case approach for determining student status. See *Sloan-Kettering*, 563 F.3d at 27-28; *United States* v. *Detroit Med. Ctr.*, 557 F.3d 412, 417-418 (6th Cir. 2009); *University of Chi. Hosps.*, 545 F.3d at 568; *United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1252 n.2 (11th Cir. 2007) (*Mount Sinai*).

Petitioners nonetheless contend that the decisions of the other circuits conflict with the decision below because some of the earlier decisions stated that the text of 26 U.S.C. 3121(b)(10) is "not ambiguous." Pet. 12

(quoting *Mount Sinai*, 486 F.3d at 1251). But even if some statements in the earlier cases were inconsistent with the analysis of the court below, such inconsistency would not warrant this Court's intervention because this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). In any event, there is no conflict between the statements in the earlier cases and the decision of the court of appeals here. In describing the statute as "not ambiguous," the courts in the prior cases meant only that the statute unambiguously "does not limit the *types* of services that qualify for the exemption" and therefore does not categorically exempt medical residents *qua* medical residents. *Mount Sinai*, 486 F.3d at 1251-1252 (emphasis added); see *University of Chi. Hosps.*, 545 F.3d at 567 (agreeing with *Mount Sinai*); *Sloan-Kettering*, 563 F.3d at 27 (agreeing with *Mount Sinai* and *University of Chi. Hosps.*); *Detroit Med. Ctr.*, 557 F.3d at 417 (relying on *Mount Sinai*). The earlier decisions expressed no opinion on the question addressed by the court below—whether the term "student" includes *full-time employees*. The courts that issued those decisions had no occasion to address that question because the Treasury Regulations in effect at the time did not treat full-time employees as categorically excluded from the student exception.[1]

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[1] Petitioners are also incorrect in contending that "[t]he government itself has acknowledged the existence of [a] conflict" between the decision below and the earlier cases. Pet. 15. The quotation on which petitioners base that contention is from the government's opening brief in the University's appeal in this case. Because that brief preceded the decision below, the government's statement cannot possibly be conceding a conflict. The quotation from the government's brief simply acknowledges that earlier cases had rejected the government's argument

Petitioners are also wrong in contending (Pet. 16) that the decision below will cause taxpayers in different parts of the country to be subject to different FICA tax obligations. All services performed on or after April 1, 2005, are governed by the new regulations, which provide that full-time employees are ineligible for the "student" exception. That full-time employee rule applies to taxpayers in every judicial circuit. Because no other court has addressed the validity of the amended Treasury regulations, there is no basis for concluding that similarly-situated medical residents who perform full-time employment in other circuits will be exempt from FICA taxes.[2]

3. Petitioners' contention (Pet. 17-18) that the decision below conflicts with *Chevron* is likewise without merit. As discussed above (see pp. 10-12, *supra*), the court of appeals correctly applied the *Chevron* analysis to the issue presented in this case. In any event, petitioners' assertion that the court below "misapplic[d]" (Pet. 17) that settled framework in this particular case does not warrant the Court's review.

Petitioners' contention that the court of appeals adopted an "extreme level of deference to tax regula-

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that medical residents as an occupational class are per se ineligible for the student exception. See 08-2193 Gov't C.A. Br. 42 n.7.

[2] Taxpayers throughout the country are also now subject to a uniform rule for services performed before April 1, 2005. On March 2, 2010, the Internal Revenue Service announced that it had made an administrative determination to accept the position (reflected in the decisions of the Second, Sixth, Seventh, and Eleventh Circuits on which petitioners rely) that medical residents are exempt from FICA taxes for tax periods covered by the prior regulations. See I.R.S. News Release IR-2010-25 (Mar. 2, 2010), http://www.irs.gov/pub/irs-tege/nr-2010_25.pdf.

tions" is mistaken. Pet. 18. The court simply observed that the complexities of the Internal Revenue Code frequently give rise to a need for regulatory interpretation, even of terms that have a common meaning in other contexts. Pet. App. 10a-12a. That observation is borne out by numerous decisions of this Court upholding regulatory definitions of statutory terms that had ostensibly common meanings. See *Cottage Savings Ass'n* v. *Commissioner*, 499 U.S. 554, 559-561 (1991) ("disposition of property"); *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 476 (1979) ("business league"); *United States* v. *Correll*, 389 U.S. 299, 304 (1967) ("meals and lodging . . . away from home"); *Magruder* v. *Washington, Balt. & Annapolis Realty Corp.*, 316 U.S. 69, 73 (1942) ("carrying on or doing business"); *Helvering* v. *Reynolds*, 313 U.S. 428, 433 (1941) ("acquisition").

Contrary to petitioners' implication (Pet. 18), the court of appeals did not suggest that Treasury regulations may never be invalidated as contrary to plain statutory language. Indeed, the court acknowledged that they may, citing decisions of this Court that had invalidated regulations on that basis. Pet. App. 11a (citing *Knight* v. *Commissioner*, 552 U.S. 181 (2008), and *Mauss* v. *Higgins*, 312 U.S. 443 (1941)). The court of appeals simply (and correctly) concluded that the regulations at issue here are not contrary to FICA but are instead a permissible interpretation of ambiguous statutory language.

4. As petitioners note (Pet. 20), the application of the student exemption is an issue of significant administrative and fiscal importance to the Treasury, involving as much as $700 million annually in FICA taxes for medical residents alone. The court below decided that issue

correctly, upholding the full-time employee rule, which provides an easily administrable bright-line test. That rule resolves the uncertainty and controversy over the application of FICA taxes that was generated by the decision in *Apfel*. The rule is consistent with the statutory language, and it gives effect to Congress's intent to exempt from FICA coverage only employment that generates nominal wages and exemption of which will not result in a significant loss of Social Security and Medicare benefits. Because the court of appeals' decision upholding the full-time employee rule does not conflict with any decision of this Court or any other court of appeals, this Court's review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH; MAYO CLINIC; AND REGENTS OF THE UNIVERSITY OF MINNESOTA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

The government concedes many of the principal points that petitioners raise in favor of certiorari.

The government acknowledges, for example, that medical residents' tax status under the Federal Insurance Contributions Act ("FICA") is "an issue of significant administrative and fiscal importance to the Treasury, involving as much as $700 million annually." Opp. 15. Moreover, the government now "accept[s] the position . . . that medical residents are exempt from FICA taxes for tax periods" preceding the 2005 promulgation of the Treasury Department's full-time employee regulation, which purports to narrow the statutory Student Exemption to exclude all full-time employees. *Id.* at 14 n.2. The government further admits that, in the decision below, the Eighth Circuit "recognized that 'four of [its] sister circuits ha[d] recently declared, in cases arising under the former regulations,' that 'the student exception statute is *unambiguous*' and 'does not limit the types of services that qualify for the exemption.'" *Id.* at 8 (quoting Pet. App. 9a) (emphasis added).

The government nevertheless urges this Court to deny review because it sees "no conflict between the statements in the earlier cases"—one of which reiterated *five times* that the Student Exemption unambiguously encompasses medical residents who are enrolled in and regularly attending classes (*see United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27-28 (2d Cir. 2009))—"and the decision of the court of appeals here." Opp. 13. According to the government, the decision below is distinguishable because it was decided after the promulgation of the full-time employee regulation.

That position is untenable. The argument that the government advanced below—that the statutory Student Exemption can be construed by the Treasury Department to exclude full-time employees– is the *same* argument that the government advanced in the Second, Sixth, Seventh, and Eleventh Circuits, where it contended that "residents simply cannot qualify as students under the student exception" because "residents' hours [are] not part-time." Br. of the United States at 46-47, United States v. Mount Sinai Med. Ctr. of Fla., Inc., 486 F.3d 1248 (11th Cir. 2007) (No. 06-11693). Those circuits *all* rejected the government's reading of the statutory language, and held that the Student Exemption "unambiguously" includes medical residents who otherwise satisfy the Exemption's statutory criteria. *Univ. of Chi. Hosps. v. United States*, 545 F.3d 564, 565 (7th Cir. 2008). The Eighth Circuit, in contrast, agreed with the government's reading of the statute—but, in so doing, acknowledged that it was departing from the interpretation of the Student Exemption adopted by the Second, Sixth, Seventh, and Eleventh Circuits. *See* Pet. App. 9a ("[i]f [the other circuits'] interpretation of the statute is correct, we must affirm").

The newly promulgated full-time employee regulation thus does nothing to diminish the irreconcilable conflict on the important question of statutory interpretation presented in this case. Only an authoritative resolution of that question by this Court can prevent "more litigation costs by educational institutions that can ill-afford them . . . and continued uncertainty across the country" on an issue that has profound financial implications not only for the Treasury Department, but also for the Nation's 8,000 residency programs and 100,000 medical residents. Br. of Am. Med. Colleges at 12.

ARGUMENT

The question before the Court is whether FICA's Student Exemption encompasses medical residents who, as part of their graduate medical education, provide full-time patient care while enrolled in a residency program sponsored by a school, college, or university. The Second, Sixth, Seventh, and Eleventh Circuits have held that the Student Exemption is *unambiguous* in this regard and thus cannot be narrowed by the Treasury Department to categorically exclude medical residents. *See Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 27; *United States v. Detroit Med. Ctr.*, 557 F.3d 412, 417-18 (6th Cir. 2009); *Univ. of Chi. Hosps.*, 545 F.3d at 567; *United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1251-53 (11th Cir. 2007). According to these courts, any reading of the Student Exemption that categorically excludes medical residents is "textually untenable" (*Univ. of Chi. Hosps.*, 545 F.3d at 567) and conflicts with the "plain" (*Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d at 1252), "entirely clear" (*id.*), and "unambiguous" (*Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 27) language of the Student Exemption.

In the decision below, the Eighth Circuit acknowledged that "four of [its] sister circuits have recently declared . . . that the student exception statute is unambiguous" and encompasses medical residents who treat patients full-time while enrolled in and regularly attending classes. Pet. App. 9a. The court nevertheless concluded that those decisions "cannot be correct." *Id.* at 10a. According to the Eighth Circuit, the Student Exemption is "ambiguous on the question whether a medical resident working for the school full-time is a 'student'" and the Treasury Department can therefore construe the statutory lan-

guage to exclude *all* medical residents and other full-time employees. *Id.* at 12a.

Despite the Eighth Circuit's explicit acknowledgment that it was departing from the decisions of four other circuits, the government resists this Court's review. In so doing, it relies heavily on the Eighth Circuit's far-from-pellucid footnote suggesting that, "*[v]iewed narrowly*," the prior circuit court decisions are distinguishable because they did not expressly "address the validity of the amended regulations." Pet. App. 9a n.2 (emphasis added). According to the government (and, perhaps, the Eighth Circuit's footnote), the "earlier decisions expressed no opinion on the question addressed by the court below—whether the term 'student' includes full-time employees." Opp. 13 (emphasis omitted). But, in fact, that is *precisely* the question addressed by the Second, Sixth, Seventh, and Eleventh Circuits. Indeed, the government argued at length in each of those courts that medical residents do not qualify as "students" under the statutory Student Exemption because they are engaged in full-time paid employment.

In the Sixth Circuit, for example, the government argued that "[m]edical residents work long hours treating patients, and they are paid more than nominal compensation in return. Having begun their working lives, residents should be covered by FICA." Br. of the United States at 17, *Detroit Med. Ctr.* (No. 07-1602). The government added, "[a]llowing residents to invoke the student exception would conflict with the clear intent of Congress to reserve the student exception for students working few hours and earning nominal compensation." *Id.* at 55 (internal quotation marks omitted). Similarly, it contended in the Seventh Circuit that, "[s]ince no

medical resident or intern today works less than 40 hours per week and frequently is required to work up to 80 hours per week, it is obvious that the educational component is incidental to the residents' services." Reply Br. of the United States at 23, *Univ. of Chi. Hosps.* (No. 07-1838) (emphasis omitted). And, on multiple occasions, the government argued that "the residents' hours were not part-time or intermittent, and their pay certainly was not 'nominal.' As a result, the residents simply cannot qualify as students under the student exception." Br. of the United States at 46-47, *Mount Sinai Med. Ctr. of Fla., Inc.* (No. 06-11693); *see also* Br. of the United States at 40, *Albany Med. Ctr. v. United States*, 563 F.3d 19 (2d Cir. 2009) (No. 07-0949) (same); Br. of the United States at 44, *Univ. of Chi. Hosps.* (No. 07-1838) (same).

Moreover, even in the cases regarding pre-2005 tax periods, the government repeatedly relied on the full-time employee regulation in defense of its position—arguing that, while "not controlling" in litigation concerning pre-2005 taxes, the regulation "is instructive regarding the nature and type of services that the IRS, the agency charged with interpreting §3121, deems 'incident to' a course of study under the student exception." Br. of the United States at 66 n.11, *Univ. of Chi. Hosps.* (No. 07-1838); *see also* Br. of the United States at 65 n.13, *Albany Med. Ctr.* (No. 07-0949) (same); Br. of the United States at 64 n.12, *Detroit Med. Ctr.* (No. 07-1602).

Every circuit to consider the government's statutory argument in a pre-2005 tax case rejected it. Each of those circuits held that "the statutory language of [FICA's Student Exemption] is not ambiguous" and that "the services performed by medical residents are not categorically ineligible for the stu-

dent exemption from FICA taxation." *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d at 1249-50, 1251; *see also, e.g., Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 28 (the Student Exemption "is unambiguous"). As a result, the government itself has now conceded that, at least for the pre-2005 tax period, its artificially narrow reading of the statutory Student Exemption is no longer defensible. Opp. 14 n.2.

In the Eighth Circuit, the government again argued—as it had done in four circuits previously—that residents are categorically ineligible for the Student Exemption because of their full-time status. *See, e.g.*, Br. of the United States at 47, Regents of Univ. of Minn. v. United States (8th Cir. filed Sept. 2, 2008) (No. 08-2193). In contrast to the Second, Sixth, Seventh, and Eleventh Circuits, however, the Eighth Circuit agreed with the government's position that the Student Exemption is "ambiguous" and can reasonably be read to exclude all medical residents and other full-time employees. Pet. App. 12a.

Accordingly, the decisions in the Second, Sixth, Seventh, and Eleventh Circuits present the *same* issue as the decision below: Can the Treasury Department validly construe the statutory Student Exemption to categorically exclude all medical residents? Whether that narrowing construction of the statutory language is advanced in litigation or embodied in a regulation, the interpretation is only permissible if the plain statutory language is susceptible to such a reading. According to four circuits, the language of the "student exception unambiguously does *not* categorically exclude medical residents as 'students'" and thus is not amenable to the government's narrowing construction. *Univ. of Chi. Hosps.*, 545 F.3d at 565. According to the Eighth Circuit, however, those decisions "cannot be correct"

because the statute is "ambiguous on the question" of its applicability to full-time employees and thus can be interpreted by the Treasury Department to exclude all such employees. Pet. App. 10a, 12a.[1]

The government nevertheless attempts to obscure this circuit split by contending that the Second, Sixth, Seventh, and Eleventh Circuits "expressly relied on the fact that the prior regulations mandated a fact-specific, case-by-case approach for determining student status." Opp. 12. In fact, none of those decisions relied on the Treasury Department's regulations when concluding that the language of the statutory Student Exemption was unambiguous. Those circuits that considered the prior regulations did so only after concluding that, on its own terms, the statutory language is unambiguous. The Seventh Circuit, for example, held that the "student exception unambiguously does *not* categorically exclude medical residents as 'students,'" and then went on to explain that, *"[e]ven if [it] were to consider the statute ambiguous*, the implementing Treasury Regulation . . . implies a case-specific analysis." *Univ. of Chi. Hosps.*, 545 F.3d at 565 (second emphasis

[1] Moreover, even if the government were correct (at 13) that the Second, Sixth, Seventh, and Eleventh Circuits only addressed whether medical residents are excluded from the Student Exemption due to the nature of the services they perform—and not because of the hours they spend performing those services—the Eighth Circuit's decision would still conflict with those earlier cases. Each of those four circuits held that the Student Exemption unambiguously encompasses at least *some* medical residents. Thus, according to those circuits, the Treasury Department cannot categorically exclude *all* medical residents from the Student Exemption—whether based on the nature of the services they render or the time spent rendering those services.

added); *see also Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 27-28 ("We agree . . . that the statute is unambiguous . . . . Even if we were to find ambiguity in the statute, the method for resolving the ambiguity is found in the implementing regulations."); *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d at 1252 n.2 (relegating analysis of the prior regulations to a footnote).

The government also seeks to minimize the significance of the lower courts' disagreement by suggesting that the conclusions of the Second, Sixth, Seventh, and Eleventh Circuits regarding the absence of ambiguity in the statutory Student Exemption are merely stray "statements" that cannot be the source of a true circuit conflict. But the conclusion that the Student Exemption unambiguously encompasses medical residents who otherwise satisfy the statutory criteria was an essential component of those courts' statutory analysis. Indeed, the Second, Seventh, and Eleventh Circuits all expressly relied on the absence of ambiguity in the Student Exemption to reject the government's attempted reliance on legislative history to alter the meaning of the statute's plain language. *See Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d at 1252 ("The government's attempt to look past the plain language of the statute in reliance on the legislative history violates a basic principle of statutory interpretation. . . . We will not review the legislative history of this statute to create an ambiguity where there is none."); *see also Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 28; *Univ. of Chi. Hosps.*, 545 F.3d at 570.[2]

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[2] The legislative history on which the government relies here (at 11) does not support its reading of the Student Exemption. The descriptions of the Student Exemption in the committee

The government is therefore wrong to suggest that taxpayers in the Second, Sixth, Seventh, and Eleventh Circuits will not be treated differently from taxpayers in the Eighth Circuit. Opp. 14. Four circuits have already explicitly held that the unambiguous statutory language of the Student Exemption prevents the Treasury Department from categorically excluding medical residents and other full-time employees from the statute's scope. The fact that the government has now embodied its flawed statutory interpretation in a regulation will do nothing more than "force[e] affected institutions and residents to file repetitive cases in those circuits" (Br. of Ass'n of Am. Med. Colleges at 12), which, bound by their own prior precedent construing the language of the Student Exemption, will necessarily reject the government's position yet again.

Indeed, the government's reading of the Student Exemption is manifestly unreasonable, and the

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[Footnote continued from previous page]

reports the government cites indicate that Congress intended the Student Exemption to apply beyond part-time work for nominal wages to full-time work by students employed by their schools. For example, the House Report that accompanied the initial enactment of the Student Exemption explained that service would be exempted from taxation if its compensation "does not exceed $45 . . . *or* . . . without regard to amount of compensation, if service is performed by a student enrolled and regularly attending classes at a school, college, or university." H.R. Rep. No. 728, 76th Cong., 1st Sess. 47-48 (1939) (emphasis added). Similarly, the House Report accompanying amendments enacted in 1950 explained that the Student Exemption covers "service performed for nominal amounts in the employ of tax-exempt nonprofit organizations . . . *and* service performed by students in the employ of colleges and universities." H.R. Rep. No. 1300, 81st Cong., 1st Sess. 12 (1949) (emphasis added).

Eighth Circuit's decision endorsing that reading thus cannot be reconciled with the interpretative principles articulated by this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Although the government strategically invokes the term "pupil" as a synonym for "student" to conjure up images of young schoolchildren (Opp. 10), the term "student" is, in fact, far broader. It includes *any* "'person formally engaged in learning, esp[ecially] one enrolled in a school or college.'" *Id.* (quoting *Random House Webster's Unabridged Dictionary* 1888 (2d ed. 2001)). The definition therefore encompasses individuals "engaged in learning" in a hands-on, interactive setting.

Medical residents unambiguously satisfy the ordinary and accepted definition of "student." Just as law students sit for a bar exam after completing accredited educational programs that often include clinical courses, medical residents become eligible for a specialty board examination after graduating from nationally accredited programs that include a clinical learning component. Pet. App. 22a; U.S. C.A. App. 300 (No. 08-2193). In addition to engaging in didactic sessions with instructors guiding their hands-on learning, residents register for electives, attend lectures, receive reading assignments, take tests, and join journal clubs—much like many other graduate students. Pet. App. 22a, 41a n.10, 63a. As one federal district court concluded after holding a full trial on the Student Exemption issue, such "graduate medical education is absolutely vital to teach inexperience[d] doctors who graduate from medical school how to be sophisticated and accomplished practitioners in a complex world of medical specialization." *United States v. Mount Sinai Med.*

Ctr. of Fla., Inc., 2008 WL 2940669, at *2 (S.D. Fla. July 28, 2008).

The government disagrees with this reading of the term "student"—but, when confronted with adverse precedent rejecting its peculiarly selective definition of the term, the government declined to approach Congress to seek a statutory amendment. It instead promulgated a regulation purporting to overrule those decisions, and now seeks, once again, to defend its flawed reading of the Student Exemption in the lower courts.

Twenty years of litigation on this issue are enough. This Court should grant review to forestall the needless, repetitive, and wasteful litigation that will inevitably be generated by the government's unwillingness to accept prior decisions rejecting its untenable interpretation of the Student Exemption.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

BRIEF FOR THE AMERICAN HOSPITAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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United States v. Mem'l Sloan-Kettering Cancer Ctr.,
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United States v. Mount Sinai Med. Ctr. of Fla., Inc.,
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United States v. Mount Sinai Med. Ctr. of Fla., Inc.,
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26 U.S.C. § 3121(b)(10) 1, 4

26 C.F.R. § 31.3121(b)(10)-2(c) (pre-Apr. 1,
2005) 4

26 C.F.R. § 31.3121(b)(10)-2(d) (post-Apr. 1,
2005) 6

26 C.F.R. § 31.312(b)(10)-2(e) (post-Apr. 1,
2005) 6

OTHER AUTHORITIES

AAMC, *Key Facts About Teaching Hospitals*
(Feb. 2009), http://www.aamc.org/news
room/presskits/keyfactsaboutth.pdf 11, 12

AAMC, *What Roles Do Teaching Hospitals
Fulfill* (2009), http://www.aamc.org/about/
teachhosp_facts1.pdf 12

AHA, *Beyond Health Care: The Economic
Contribution of Hospitals* (Apr. 2008),
http://www.aha.org/aha/trendwatch/2008/
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AHA, *The Economic Downturn and its Impact on Hospitals* (Jan. 2009), http://www.aha.org/aha/trendwatch/2009/twjan2009econimpact.pdf 13, 14, 15

AHA, *Teaching Hospitals: Their Impact on Patients and the Future Health Care Workforce* (Sept. 2009), http://www.aha.org/aha/trendwatch/2009/twsept2009teaching.pdf 10, 11, 12, 15

AHA, *Teaching Hospitals—Social Missions at Risk* (May 2002), http://www.aha.org/aha/trendwatch/2002/twmay2002.pdf 11, 12

AHA, *Uncompensated Hospital Care Cost Fact Sheet* (Nov. 2009), http://www.aha.org/aha/content/2009/pdf/09uncompensatedcare.pdf 7, 8, 9

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AHA, *Underpayment by Medicare and Medicaid Fact Sheet* (Nov. 2009), http://www.aha.org/aha/content/2009/pdf/09medicunderpayment.pdf 9

AHA, *Workforce 2015: Strategy Trumps Shortage* (Jan. 2010), http://www.aha.org/aha/content/2010/pdf/workforce2015report.pdf 11

John D. Colombo *et al.*, *Charity Care for Nonprofit Hospitals: A Legal and Administrative Guide* § 3.02[A] (2009) 8

Mayo Clinic, *Annual Report* (2008), http://www.mayoclinic.org/mcitems/mc0700-mc0799/MC0710-2008.pdf 12

The American Hospital Association ("AHA") respectfully submits this brief as *amicus curiae* in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

The AHA is a national not-for-profit association that represents the interests of roughly 5,000 hospitals, health care systems, networks, and other care providers, as well as 37,000 individual members. The members of the AHA are committed to finding innovative and effective ways of improving the health of the communities they serve. The AHA educates its members on health care issues and trends, and it also advocates on their behalf in legislative, regulatory, and judicial fora to ensure that their perspectives and needs are understood and addressed. The AHA's members include teaching hospitals that sponsor medical residency programs as well as other participants in the health care industry that benefit from the existence of a robust regime of teaching hospitals. The AHA therefore has a significant interest in a definitive resolution of the question whether all medical residents can be categorically excluded from coverage under the "student" exemption from Social Security taxes codified in 26 U.S.C. § 3121(b)(10).

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. The parties have consented to the filing of this brief and their letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Nationwide, the amount of Social Security taxes levied each year for medical residents is estimated to be approximately $700 million. Pet. Br. 20. On April 1, 2005, a Treasury Department regulatory amendment went into effect that categorically excludes medical residents from Social Security's "student" exemption, simply because residents, in addition to the lectures, conferences, and other types of more formal classroom education that they receive, perform at least 40 hours a week of supervised patient care. Pet. App. 5a-7a. The amendment thus forecloses teaching hospitals from demonstrating that their residents are nonetheless properly characterized as "students" under the longstanding regulatory definition, which otherwise takes account of all relevant facts and circumstances and does not place dispositive significance on the hours spent performing services. Notably, when teaching hospitals and the Government have litigated the specific issue whether medical residents fall within the longstanding definition notwithstanding their long hours of supervised patient care, courts appear to have uniformly ruled in favor of the hospitals.

Consequently, the practical effect of the amended regulation is to "divert the scarce resources of our country's teaching hospitals and medical schools from their crucial missions of patient care, physician training, and medical research" in a manner that Congress did not intend, 15 U.S.C. § 37b(a)(1)(E)—the same type of diversion that Congress deemed so deleterious in 2004 that it passed special legislation shielding teaching hospitals from antitrust lawsuits challenging the matching process those hospitals

used to select residents, *id.* § 37b(b). Notably, since 2004, the economic climate has simultaneously rendered the myriad services our nation's hospitals provide for their communities all the more "crucial" and the resources of those hospitals even more "scarce." Teaching hospitals are, among other things, a critical part of the safety net protecting indigent patients in need of health care and health education, yet the economic downturn has increased the size of the population in need of such protection while imperiling the ability of hospitals to continue providing such protection.

For the foregoing reasons, the Eighth Circuit's decision upholding the Treasury Department's categorical exclusion of medical residents from the "student" exemption is sufficiently important that it warrants this Court's review. And such review is especially necessary given that the Eighth Circuit's decision is in stark conflict with decisions of the Second, Sixth, Seventh, and Eleventh Circuits, all of which hold that teaching hospitals are not categorically precluded from proving that their residents are properly characterized as students. *See* Pet. Br. at 12-16.

ARGUMENT

I. THE TREASURY DEPARTMENT'S CATEGORICAL EXCLUSION OF FULL-TIME EMPLOYEES FROM THE "STUDENT" EXEMPTION HAS A SIGNIFICANT PRACTICAL EFFECT ON OUR NATION'S TEACHING HOSPITALS

In 1939, Congress exempted from Social Security taxation "service performed in the employ of a school, college, or university" by a "student who is enrolled

and is regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10). For over sixty years, the Treasury Department's regulation enforcing the "student" exemption essentially instructed that "student" status should be determined "on the basis of the relationship of [the] employee with the organization for which the services are performed" and that "[a]n employee who performs services ... as an incident to and for the purpose of pursuing a course of study ... has the status of a student in the performance of such services." 26 C.F.R. § 31.3121(b)(10)-2(c) (pre-Apr. 1, 2005).

This regulation required a case-specific inquiry into all of the relevant "facts and circumstances" concerning a putative student's employment. Pet. App. 42a n. 12; *see also United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1253 (11th Cir. 2007) ("case-by-case analysis is necessary to determine whether a medical resident ...qualifies for ... the student exemption"); *Univ. of Chi. Hosps. v. United States*, 545 F.3d 564, 570 (7th Cir. 2008) ("case-by-case analysis is required to determine whether medical residents qualify for the [student] exemption"); *United States v. Detroit Med. Ctr.*, 557 F.3d 412, 417-18 (6th Cir. 2009) ("need to know what the residents in the program do and under what circumstances"); *United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 28 (2d Cir. 2009) ("particularized review [necessary] of whether ... medical residents [at issue] qualify for the student exclusion").

And, of critical importance here, when teaching hospitals have litigated this case-specific issue against the Government in the context of medical

residents, courts appear to have uniformly ruled in their favor.

For example, in one of the cases below, the district court granted summary judgment to the University of Minnesota, notwithstanding the fact-intensive nature of the question, given the irrefutable record established by the university. Pet. App. 60a-65a. And, in the other, the district court granted summary judgment to the Mayo Foundation, because the record did not materially diverge from the facts established in a prior case in which Mayo had prevailed over the Government in a bench trial in front of the same court. *Id.* at 43a-46a; *United States v. Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 999, 1015-19 (D. Minn. 2003); *see also, e.g., Ctr. for Family Med. v. United States*, No. 05-4049, 2008 WL 3245460, *1, 8-11 (D.S.D. Aug. 6, 2008) (granting summary judgment for the teaching hospital).

The practical significance of a case-specific inquiry is perhaps most vividly illustrated by *United States v. Mount Sinai Medical Center of Florida, Inc.*, No. 02-22715, 2008 WL 2940669 (S.D. Fla. July 28, 2008). There, the district court had initially ruled that medical residents were categorically excluded from the "student" exemption, but had been reversed by the Eleventh Circuit. *Id.* at *1. On remand, the court then ruled in favor of the teaching hospital after holding a bench trial in which it considered all the relevant facts and circumstances. *Id.* at *1, 28-36. Of particular salience here, the court held, as others had held previously, that "'[t]ime alone cannot be the sole measure of the relationship between

services performed and a course of study.'" *Id.* at *35 (quoting *Mayo*, 282 F. Supp. 2d at 1018).

As noted above, *amicus* is unaware of a single case to the contrary—i.e., one in which a court has ruled that a medical resident is not a "student" under the case-specific approach, let alone so ruled based exclusively on the amount of time residents spend providing supervised patient care.

Nonetheless, in 2005, the Treasury Department amended its regulation: while generally retaining its longstanding regulatory definition of "students" as well as the case-specific, "facts and circumstances" approach, it promulgated a categorical exclusion of "full-time employee[s]," including "an[y] employee whose normal work schedule is 40 hours or more per week." *See* 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(i), (iii) (post-Apr. 1, 2005). The amended regulation specifically identifies medical residents as an example of a "full-time employee," *id.* § 31.3121(b)(10)-2(e), Ex. 4, consistent with the Department's candid admission that the amendment was designed to abrogate adverse judicial decisions under its prior regulation, Pet. Br. at 7.

The practical effect of the regulatory amendment is obvious in light of the uniform success teaching hospitals have had litigating under the case-specific regulatory interpretation of the "student" exemption, the fact that such litigation has recently "exploded across the country," Pet. App. 3a, and the magnitude of the stakes that are collectively involved. By depriving hospitals of the ability even to attempt to demonstrate that their medical residents qualify as "students" under the longstanding definition of that term, the amended regulation "divert[s] the scarce

resources of our country's teaching hospitals and medical schools from their crucial missions of patient care, physician training, and medical research" in a manner that Congress did not intend. 15 U.S.C. § 37b(a)(1)(E). As discussed below, that diversion is particularly harmful in the current economic climate, which has strained the resources of our nation's hospitals at the very time our hospitals are being increasingly called upon to act as the safety net for the communities that they serve.

II. IN THE FACE OF TRYING ECONOMIC CIRCUMSTANCES, OUR NATION'S HOSPITALS STRIVE TO CONTINUE SERVING THEIR COMMUNITIES IN MYRIAD WAYS

As this Court recognized long ago, "hospitals ... have become centers for the 'delivery' of health care" and thus have "assume[d] a larger community character." *Abbott Labs. v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 11 (1976). For both hospitals generally and teaching hospitals in particular, this "community character" manifests itself in various ways. Yet the current economic climate has posed a serious challenge to the ability of hospitals to maintain the panoply of services that they provide.

A. Hospitals In General Give Back To Their Communities In A Wide Variety Of Ways

1. Hospitals throughout the nation provide "uncompensated care," i.e., "hospital care provided for which no payment was received from the patient or insurer." AHA, *Uncompensated Hospital Care Cost Fact Sheet* at 1 (Nov. 2009) ("*Uncompensated Care*"), http://www.aha.org/aha/content/2009/pdf/09uncompensatedcare.pdf (last visited February 11, 2010). In addition to unanticipated "bad debt," which "is often

generated by medically indigent and/or uninsured patients," hospitals also provide "charity care," which "consists of services for which hospitals neither received, nor expected to receive, payment because they had determined, with the assistance of the patient, the patient's inability to pay." *Id.* at 2. The most common form of charity care involves the free performance of "medically necessary services" for "individuals with annual incomes up to a specified percentage of the [f]ederal [p]overty [l]evel (usually 150 percent to 200 percent)." John D. Colombo *et al.*, *Charity Care for Nonprofit Hospitals: A Legal and Administrative Guide* § 3.02[A] at 3-12 (2009).

But charity care is by no means limited to such emergency services. It often also encompasses care in the form of "free clinics, vaccinations," "health screenings," and other "[s]ubsidized health services." AHA, *Beyond Health Care: The Economic Contribution of Hospitals* at 6 (Apr. 2008) ("*Beyond Health Care*"), http://www.aha.org/aha/trendwatch/2008/twapr2008econcontrib.pdf (last visited Feb. 11, 2010). Various examples of such programs can be found within a recent AHA publication. *See* AHA, *Community Connections: Ideas & Innovations for Hospital Leaders, Case Examples 5* (Jan. 2010) ("*Community Connections*"), http://www.caringforcommunities.org/caringforcommunities/content/10commconncaseex.pdf (last visited Feb. 11, 2010).

Although the precise characterization of what constitutes "uncompensated care" varies somewhat among hospitals, general estimates of the magnitude of the costs of such care are still possible. According to data generated from the AHA's Annual Survey of Hospitals, which is the most comprehensive source of

hospital financial data, uncompensated care cost our nation's hospitals $36.4 billion in 2008, which constituted 5.8% of their total expenses (exclusive of bad debt). *Uncompensated Care* at 1-2, 4.

2. In addition to wholly uncompensated care, reimbursement for care provided to Medicare and Medicaid patients, which "account[s] for 55 percent of all care provided by hospitals," frequently "result[s] in underpayment." AHA, *Underpayment by Medicare and Medicaid Fact Sheet* at 1 (Nov. 2009), http://www.aha.org/aha/content/2009/pdf/09medicundrpayment.pdf (last visited Feb. 11, 2010). This underpayment results from the fact that the "[p]ayment rates for Medicare and Medicaid [generally] are set by law rather than through a negotiation process," and "[t]hese payment rates are currently set below the costs of providing care" in most hospitals. *Id.*

According to aggregate data generated from the AHA's Annual Survey of Hospitals, "hospitals received payment of only 91 cents for every dollar spent ... caring for Medicare patients in 2008," and "only 89 cents for every dollar spent ... caring for Medicaid patients in 2008." *Id.* at 2 (emphasis omitted). Combined underpayments amounted to $32.4 billion in 2008, a massive increase from 2000, when the equivalent amount was only $3.8 billion. *Id.* at 3.

3. Nor are the services hospitals perform for their communities strictly limited to the provision of traditional health care. "Hospitals offer services that aid in disease prevention, promote health awareness, contribute to advances in medicine and address other societal needs." *Beyond Health Care* at 6. For

example, "community programs" offered by hospitals include "[h]ealth programs[,] such as educational outreach ... and support groups," and "[p]rograms to address the social needs of communities," such as "Meals on Wheels" and "various [types of] shelters." *Id.*; *see also Community Connections*. Hospitals also conduct "[c]linical research" and provide "training programs" and "[c]ontinuing education for health professionals." *Beyond Health Care* at 6.

B. Teaching Hospitals In Particular Provide A Wide Variety Of Benefits To Their Communities

1. Most obviously, the nation's teaching hospitals perform the invaluable task of training the next generation of physicians. Pet. Br. at 4-5. And, as petitioners have noted, this requires immersing residents, while supervised, in the real-world performance of patient care, despite the fact that supervised patient care performed by residents is far less cost-efficient for the hospital. *Id.* As the AHA has explained in the past, "[t]raining resident physicians involves significant costs beyond those customarily associated with patient care," because, in addition to the fact that "the involvement of trainees in care reduces the overall efficiency of hospital operations," "teaching hospitals must pay for faculty, faculty offices, classroom space, comprehensive medical libraries, and advanced, highly sophisticated technological equipment to support their residency programs." AHA, *Teaching Hospitals: Their Impact on Patients and the Future Health Care Workforce* at 3 (Sept. 2009) ("*Teaching Hospitals*"), http://www.aha.org/aha/trendwatch/2009/twsept2009teaching.pdf (last visited Feb. 11, 2010).

The task of training the next generation of physicians is particularly critical given recent estimates that there will be a "shortage of 124,000 physicians" "by 2025." *Id.* at 4; *see generally* AHA, *Workforce 2015: Strategy Trumps Shortage* (Jan. 2010), http://www.aha.org/aha/content/2010/pdf/workforce2015report.pdf (last visited Feb. 11, 2010).

But it is far from the only service that teaching hospitals provide to their communities.

2. While all hospitals generally act as a safety net for their community, *see supra* at 7-10, teaching hospitals are among the highest providers of uncompensated care and community programs. For example, in 2006, teaching hospitals incurred 71% of total charity care costs among hospitals surveyed while constituting only 22% of the hospitals surveyed. Association of American Medical Colleges ("AAMC"), *Key Facts About Teaching Hospitals* at 6 (Feb. 2009) ("*Key Facts*"), http://www.aamc.org/newsroom/presskits/keyfactsaboutth.pdf (last visited Feb. 11, 2010); *see also* AHA, *Teaching Hospitals—Social Missions at Risk* at 2 (May 2002) ("*Social Missions*"), http://www.aha.org/aha/trendwatch/2002/twmay2002.pdf (last visited Feb. 11, 2010). Teaching hospitals likewise play an exemplary role in providing community programs, such as AIDS services, substance abuse outpatient services, and crisis prevention assistance. *See Key Facts* at 5.

3. Furthermore, as the AHA recently documented, "[t]eaching hospitals play distinct roles in their communities' care delivery systems [by] offering specialized services not available in other facilities." *Teaching Hospitals* at 1. "76 percent of hospitals that provide heart transplants are teaching

institutions," and "teaching hospitals treat[] approximately 96 percent of all patients needing burn care services and 91 percent of all patients needing pediatric intensive care services." *Id.* at 1-2; *see also Key Facts* at 3-4; AAMC, *What Roles Do Teaching Hospitals Fulfill* at 2 (2009) ("*What Roles*"), http://www.aamc.org/about/teachhosp_facts1.pdf (last visited Feb. 11, 2010); *Social Missions* at 2.

Consequently, "patients often are transferred to [teaching] hospitals when their medical needs exceed other facilities' capabilities." *Teaching Hospitals* at 2. For example, "[i]n 2006[,] there were 321,567 Medicare patient transfers, 72 percent of which were to teaching hospitals." *Id.* More generally, the AAMC estimates that teaching hospitals "receive more than 40 percent of all transferred patients whose illnesses or injuries require a sophisticated level of technology and expertise not available at a community hospital." *What Roles* at 2.

4. Last, but certainly not least, "[t]eaching hospitals serve as centers of research and innovation, helping to develop new treatments and cures." *Teaching Hospitals* at 1. Among the countless number of breakthroughs pioneered at teaching hospitals were "[t]he first live polio vaccine, intensive care unit for newborns and pediatric heart transplant," *id.*, as well as the "[f]irst human images with an MRI," the "[f]irst successful double-lung transplant," and the "[f]irst successful surgery on a fetus in utero," *What Roles* at 1. The cost of such research is substantial. For instance, one of the petitioners in this case, the Mayo Clinic, spent $390.8 million in 2008 on research and education that was not externally sponsored. Mayo Clinic, *Annual*

Report at 43 (2008), http://www.mayoclinic.org/mcitems/mc0700-mc0799/MC0710-2008.pdf (last visited Feb. 11, 2010).

C. The Current Economic Climate Threatens The Ability Of Hospitals To Continue To Serve Their Communities

1. According to a recent AHA survey conducted in autumn of 2009, a third of hospitals experienced losses in the first half of 2009, and nearly half of hospitals suffered a moderate or significant decrease in operating margins when comparing the survey period with the equivalent period from 2008. AHA, *The Economic Crisis: Ongoing Monitoring of Impact on Hospitals* at 12-13 (Nov. 11, 2009) ("*Economic Crisis*"), http://www.aha.org/aha/trendwatch/2009/09nov-econimpsurvresults.pdf (last visited Feb. 11, 2010). Likewise, as of November of 2008, Moody's "downgraded the outlook for the not-for-profit hospital sector from stable to negative." AHA, *The Economic Downturn and its Impact on Hospitals* at 2 (Jan. 2009) ("*Economic Downturn*"), http://www.aha.org/aha/trendwatch/2009/twjan2009econimpact.pdf (last visited Feb. 11, 2010).

2. This data reflects the myriad ways in which the economic downturn affects the financial health of hospitals. Most notably, "[w]hen the economy weakens, hospitals see fewer elective cases, provide more charity care, absorb more bad debt, and care for an increasing share of Medicaid patients." *Id.* at 2.

Given that "[m]ore than 60 percent of Americans get their health insurance through employers," "[t]he recent growth in unemployment" has simultaneously "resulted in a loss of employer-sponsored insurance" and "swelled Medicaid enrollment." *Id.* at 4. At the

same time, "state tax revenue ... is falling precipitously," which has dire implications for Medicaid, since it "is funded primarily by state tax revenue" and usually constitutes "the single largest state budget item." *Id.* at 1. As a result, Medicaid "is particularly vulnerable to cuts in ... provider payment[s]," which directly affect hospitals, as well as "to cuts in eligibility [and] benefits," which indirectly "stress[] hospitals and other providers" of charity care. *Id.* And hospitals' operating revenue is further reduced by the fact that "patients put off elective procedures" during an "economic downturn." *Id.* at 5. Indeed, "many people who cannot afford care will delay seeking it until their conditions worsen and their treatment becomes even more expensive," such that "hospitals are likely to see initial drops in patients seeking care followed by an influx of emergency department visits when needs can no longer be put off." *Id.* at 6.

As the AHA's recent survey documents, when comparing the survey period with the equivalent period from 2008, 59% of hospitals found a moderate or significant increase in emergency department visits by uninsured patients, 69% found a moderate or significant increase in uncompensated care as a percent of total gross revenues, 52% found a moderate or significant increase in need for subsidized services, and 43% found a moderate or significant decrease in inpatient and elective care. *Economic Crisis* at 5-8.

3. These effects from the economic downturn are compounded by the "'once in a century' credit crisis" plaguing the country. *Economic Downturn* at 2. Hospitals often rely on credit because "payment to

hospitals traditionally lags behind care delivery," requiring them to "borrow to meet operating expenses." *Id.* at 3. They likewise "borrow to fund ... longer-term facility improvements and technology purchases." *Id.* at 2. Yet even "the municipal bond market, which historically has been a very stable and reliable means of raising cash for both hospitals and local governments, has been roiled by the credit crisis." *Id.* at 3. Consequently, credit for hospitals has become "difficult to secure" and "significantly more expensive when obtained." *Id.*

4. Given the significant role that teaching hospitals, in particular, play in providing care to the indigent, *see supra* at 11, it follows that "the economic crisis may put particular strain on teaching facilities' resources to support their training programs and their role in the safety net." *Teaching Hospitals* at 5. As of September of 2009, "49 percent of teaching hospitals ha[d] seen a moderate to significant jump in the proportion of patients covered by Medicaid or other public programs for low-income populations compared to [the prior] year." *Id.* at 2. And, during the same period, "27 percent" of teaching hospitals "reported a 'significant decrease' ... in operating margin," "52 percent ... reduced their staff, and 29 percent ... cut services such as behavioral health programs." *Id.* at 5, 6. In these circumstances, a potential savings of up to $700 million in Social Security taxes for medical residents, Pet. Br. 20, could be critical to the financial health of our nation's teaching hospitals.

5. In sum, the current economic climate has impaired the financial health of our nation's hospitals, including teaching hospitals, at the same

that it has rendered hospitals' services for the health of their communities all the more critical. In 2004, Congress interceded to prevent an unintended "diver[sion] [of] the scarce resources of our country's teaching hospitals and medical schools from their crucial missions of patient care, physician training, and medical research." 15 U.S.C. § 37b(a)(1)(E). Today, this Court should determine whether the Eighth Circuit has authorized a similar diversion, in conflict with the Second, Sixth, Seventh, and Eleventh Circuits, by upholding the categorical exclusion of medical residents from the "student" exemption and thereby foreclosing teaching hospitals from proving in court, as they have successfully and repeatedly done in the past, that their residents fall within the longstanding regulatory definition of the term despite performing long hours of supervised patient care.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR AMICI CURIAE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, AMERICAN COUNCIL ON EDUCATION, ASSOCIATION OF AMERICAN UNIVERSITIES, AND ASSOCIATION OF PUBLIC AND LAND-GRANT UNIVERSITIES IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

No. 09-837

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR AMICI CURIAE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, AMERICAN COUNCIL ON EDUCATION, ASSOCIATION OF AMERICAN UNIVERSITIES, AND ASSOCIATION OF PUBLIC AND LAND-GRANT UNIVERSITIES IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

The Association of American Medical Colleges ("AAMC") is a nonprofit educational association whose members include all 131 accredited medical schools in the United States, approximately 400 major teaching hospitals and health systems, and

nearly 90 scientific societies.[1] Collectively, these institutions and organizations sponsor the vast majority of the nation's medical residents. AAMC's mission is to improve the nation's health by strengthening the quality of medical education and training, enhancing the search for biomedical knowledge, advancing health services research, and integrating education and research into the provision of effective health care.

The American Council on Education ("ACE") was founded in 1918 and is the nation's unifying voice for higher education. Its more than 1,800 members include colleges and universities throughout the United States. ACE represents all sectors of American higher education and serves as a consensus leader on key issues affecting higher education. ACE participates as an amicus curiae only in cases that raise issues of widespread importance to institutions of higher education. ACE, for example, has filed briefs in this Court in recent years in cases such as *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007) and *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002).

The Association of American Universities ("AAU") is a nonprofit association of 60 U.S. and two Canadian preeminent public and private research universities. Founded in 1900, AAU focuses on na-

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission. The parties were timely notified of the intent to file this brief more than ten days in advance of the due date, and have consented to its filing.

tional and institutional policies that promote strong programs of university research and undergraduate, graduate, and professional education. Well over half of AAU member universities have medical schools and medical residency programs, and all have strong programs of biomedical research and advanced education that will provide the future doctors, researchers, and medical breakthroughs that will enhance the health and well-being of the nation.

Founded in 1887, the Association of Public and Land-grant Universities (A·P·L·U) is an association of public research universities, land-grant institutions, and many state public university systems. A·P·L·U member campuses enroll more than 3.5 million undergraduate and 1.1 million graduate students, employ more than 645,000 faculty members, and conduct nearly two-thirds of all academic research, totaling more than $34 billion annually. As the nation's oldest higher education association, A·P·L·U is dedicated to excellence in learning, discovery and engagement.

Amici have a substantial interest in the outcome of this case. Their member medical schools and teaching hospitals provide a clinical education for medical residents and are therefore directly affected by the Eighth Circuit's holding that residents are categorically ineligible for the student exemption to the Federal Insurance Contribution Act ("FICA"). Amici are also committed to protecting the student status of medical residents. Education is the predominant consideration in developing and implementing medical residency programs. Medical residents are students, learning to execute the tasks necessary to ensure patient wellness. This structure is the basis for the United States' ability to provide the best

medical care in the world, and the importance of the residency component of medical education should not be diminished or disregarded.

If allowed to stand unreviewed, however, the decision below threatens to do just that. In conflict with the decisions of four other circuits, the Eighth Circuit has held that the Internal Revenue Service ("IRS") may categorically exclude all residents from the student exemption on the ground that they are not "students." This decision followed 20 years of expensive and protracted litigation in which other courts uniformly rejected the IRS's position on the ground that the governing statute unambiguously allows residents to qualify for the exemption. Given the stark split in the circuits, the time has come for this Court to decide the issue and bring certainty to the law. Although the IRS has sought to overturn the rulings against it by writing regulations espousing its rejected position, no regulation could ever alter the decisions of four circuits holding that the relevant statutory language is unambiguous. Accordingly, there is no cause to subject amici's members, and the medical residents they educate, to additional years or decades of litigation before the law is clarified. The Court should grant certiorari now, and should reverse the Eighth Circuit so that residency programs will enjoy a uniform legal status that recognizes and protects their educational missions.

INTRODUCTION

The time has come for this Court to decide the important question raised by this case. For more than 20 years, the IRS has sought categorically to exclude medical residents and their educational institutions from claiming the FICA student

exemption. After years of expensive litigation and thousands of refund claims involving billions of dollars, four circuits squarely rejected that position. The Eighth Circuit, however, has now disagreed with the view of its sister circuits that the statute unambiguously rules out the IRS's interpretation.

Even though the Eighth Circuit ruled in the context of revised IRS regulations, there is no basis for this Court to forestall its review of the underlying statutory issue. As the Eighth Circuit itself recognized, if it had adopted the views of the other circuits it would have been required to rule the other way in this case. Thus, further litigation would provide no additional insight on the question at issue: whether the IRS can categorically exclude medical residents from the student exemption. The IRS should not be able to force medical schools, teaching hospitals, and their students to endure years, if not decades, of additional expensive litigation merely by writing new regulations that contradict judicial determinations.

The issue, moreover, is of critical importance to residents and the educational institutions that sponsor them. Billions of dollars are at stake, and the issue affects hundreds of educational institutions and more than 100,000 medical residents. Residents are students who receive limited stipends during this phase of their medical training, and residency programs are not intended to generate profits for their sponsoring institutions. Accordingly, subjecting these students to additional taxes meant for non-student employees—with the concomitant taxes that the sponsoring institutions must pay—may reduce incentives for institutions to sponsor this critical training, at a time when the nation needs to be increasing the number of physicians it trains. And

subjecting amici's members to another round of expensive litigation across the nation will only further reduce the resources available for these educational activities.

REASONS FOR GRANTING THE WRIT

I. THE SPLIT IN THE CIRCUITS SHOULD BE RESOLVED WITHOUT DELAY.

A. After Twenty Years Of Litigation, The Circuits Are Irreconcilably Divided.

The split in the circuits is real and direct. The statute exempts from FICA taxes any "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10). Four circuits have held that this language unambiguously allows medical residents to claim the exemption by showing that they are, in fact, students engaged in educational activities. *See United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27 (2nd Cir. 2009) ("We agree with the Sixth, Seventh, and Eleventh Circuits that the statute is unambiguous and that whether medical residents are 'students' * * * is a question of fact, not a question of law."). Underscoring this understanding, lower courts have had little difficulty holding that medical residents qualify for the exemption when their educational programs are individually scrutinized.[2]

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[2] *See, e.g., Ctr. for Family Med. v. United States*, No. 05-4049, 2008 WL 3245460 at *8-11 (D.S.D. Aug. 6, 2008) (residents entitled to claim student exemption); *United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, No. 02-22715-CIV, 2008 WL 2940669 at *2 (S.D. Fla. July 28, 2008) ("[w]hile the United States contends that the 'tipping point' for the student exemption for FICA taxes is graduation from medical school

These decisions followed a 20-year campaign by the IRS to categorically exclude medical residents from claiming the exemption. As the Eighth Circuit noted below, this has resulted in an "avalanche" of litigation that has "exploded across the country." Pet. App. 3a. The government began its campaign by targeting petitioner the University of Minnesota (the "University"). *See Minnesota* v. *Apfel*, 151 F.3d 742, 744 (8th Cir. 1998). It initiated an investigation in 1989 and issued a formal notice of statutory assessment the following year. *Id.* Following an unsuccessful administrative appeal, the University filed a civil action in the district court. *Id.* After nine years of administrative and court litigation, the Eighth Circuit held that a categorical rule excluding medical residents from the student exemption was inconsistent with governing regulations. *Id.* at 748.

Following *Apfel*, residency programs and their residents filed more than 7,000 administrative claims seeking refunds of FICA taxes, Pet. App. 4a., many at considerable expense. *See* Douglas M. Mancino & Robert C. Louthian III, *Eighth Circuit Again Allows Refund of Medical Residents' FICA Taxes*, 15 Tax'n of Exempts 195, 199 (2004) (noting that some programs "fil[ed] full (and expensive to prepare) claims for refund with the IRS"). The IRS once again required the issue to be litigated in court. Then, in 2007, the

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* * *, the more compelling evidence establishes that the actual 'tipping point' is the completion of the full residency" because that "marks the end of the formal, supervised, curriculum-directed learning"); *United States* v. *Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 999 (D. Minn. 2003) (Mayo residents are "students" under the student exemption's plain language); Pet. App. 64a (University of Minnesota residents are "students" under the student exemption's plain language).

Eleventh Circuit held that the governing statute unambiguously precludes a bright-line rule excluding medical residents from claiming the student exemption. *See United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1252 (11th Cir. 2007).

The Seventh Circuit agreed a year later, holding that "a case-by-case analysis is required to determine whether medical residents qualify for the statutory exemption from FICA taxation." *Univ. of Chicago Hosps.* v. *United States*, 545 F.3d 564, 570 (7th Cir. 2008). In 2009, the Second and Sixth Circuits joined the Eleventh and Seventh. *See Mem'l Sloan-Kettering*, 563 F.3d at 28 ("the statute unambiguously does not categorically exclude medical residents from eligibility for the student exception") (citation omitted); *United States* v. *Detroit Med. Ctr.*, 557 F.3d 412, 417 (6th Cir. 2009) ("[w]e assume that in the absence of a congressional definition of 'student,' this common word in Section 3121 was intended to have its usual and ordinary meaning of a person pursuing studies at an appropriate institution").

The IRS, however, has continued to proceed undaunted. In the Eighth Circuit, it filed a suit against petitioner Mayo Foundation in 2002 to recover money refunded to Mayo as a result of its student exemption claim. *United States* v. *Mayo Found. for Med. Educ. & Research* ("*Mayo I*"), 282 F. Supp. 2d 997, 999 (D. Minn. 2003). The district court, however, expressly rejected the government's characterization of medical residency as "on the job training," *id.* at 1017, and concluded that Mayo residents "were 'students' within the meaning of Section 3121(b)(10), enrolled in and regularly attending classes," *id.* at 1019.

The government appealed this decision, but later dismissed the appeal. Pet. App. 5a. Rather than seek an immediate ruling from the Eighth Circuit, it set about writing new regulations in an effort to redefine the statutory term—"student"—which the *Mayo I* court, and later the Second, Sixth, Seventh and Eleventh circuits, held unambiguously encompassed medical residents. The regulations were finalized in December 2004. As applied to medical residents, the lynchpin of the regulations is the IRS's blanket rule that any person who works more than 40 hours per week is categorically ineligible for the student exemption, regardless of whether that work is part of a student's education. *See* 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii). This excludes medical residents, who do not satisfy the regulatory threshold according to the IRS. *See, e.g.*, Pet. App. 19a.

Even though Mayo had already prevailed in *Mayo I*, the IRS forced it and the University to file new cases for additional refunds. In 2008, the district court ordered the refunds under the rationale adopted in *Mayo I* and later circuit cases. The court held that the regulations had no effect on the outcome because agency regulations cannot override unambiguous statutory language. As it explained, the IRS's categorical threshold changes nothing because "Congress did *not* put any limitation on [the term] 'student' with regard to how much that individual might be working in some ancillary capacity." Pet App. 40a (emphasis in original). The IRS's categorical rule "arbitrarily narrows this definition by providing that a 'fulltime' employee is not a 'student' even if the educational aspect of an employee's service predominates over the service

aspect." *Id.* And the rule "denies 'student' status to medical residents even though the services they provide are primarily for educational purposes and essential to becoming fully qualified physicians." *Id.*

On appeal, however, the Eighth Circuit expressly disagreed with its four sister circuits. It recognized that if the four other circuits' "interpretation of the statute is correct, we must affirm." Pet. App. 9a. But it held that "this interpretation * * * cannot be correct." *Id.* at 10a. Accordingly, unlike the Second, Sixth, Seventh and Eleventh Circuits, the Eighth Circuit held that medical residents can be made categorically ineligible for the student exemption. The split is thus real and direct and, as the Eighth Circuit made clear, dispositive of this case.

B. This Court Should Resolve The Issue Now, Without Forcing Amici's Members To Endure Additional Expensive And Protracted Litigation.

It is immaterial that the Eighth Circuit, unlike the other circuits, ruled against the backdrop of the 2004 regulations. As the Eighth Circuit itself stated, the regulations make no difference because if that court had followed the statutory interpretation adopted by every other circuit to have considered the issue, it would have affirmed the district court's decision. Pet. App. 9a. The IRS cannot avoid this Court's review by promulgating regulations that conflict with judicial interpretations of unambiguous statutory language and then forcing affected parties to relitigate the same issue again and again in the lower courts. The expensive whipsaw already inflicted by the IRS on Mayo and Minnesota should not be repeated with other institutions before this Court is able to clarify the law.

An agency cannot change the meaning of an unambiguous statute by promulgating a new regulation that is inconsistent with the judiciary's interpretation. "A court's prior judicial construction of a statute trumps an agency construction" where, as here, "the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). *See also Neal* v. *United States*, 516 U.S. 284, 295 (1996) ("[W]e need not decide what, if any, deference is owed the Commission in order to reject its alleged contrary interpretation. Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of stare decisis, and we assess an agency's later interpretation of the statute against that settled law."). Thus, the IRS cannot re-start the 20-year process that brought the student exemption to this Court simply by promulgating a regulation that attempts to redefine an unambiguous statutory term. Four circuit courts have ruled that the student exemption is unambiguous in not categorically excluding medical residents based on how long they work, without consideration of the educational import of their activities. As the Eighth Circuit itself recognized, the IRS's categorical contrary rule could not change the law in those circuits.

A decision by this Court to deny review would sanction regulatory gamesmanship, at the expense of amici's members, the residents they sponsor, and their educational missions. According to the government, medical residents and their sponsoring institutions are assessed $700 million dollars in FICA taxes every year, and more than 7,000 refund

claims for such taxes have already been filed, with pending claims amounting to at least $2.1 billion. *See* Pet. 20. Those numbers will only increase every year until the issue is definitively resolved by this Court.

In the meantime, if review is denied in this case, residents and their institutions will unnecessarily be forced to endure, once again, the same kind of protracted litigation that has already brought us to this place. The IRS has already subjected both Mayo and the University of Minnesota to multiple rounds of litigation. The IRS went after the University and lost in *Apfel*. Then it went after Mayo in the same circuit and lost in *Mayo I*. But rather than accept that loss, or even challenge it through the normal method—an appeal—the IRS dismissed its appeal in *Mayo I*, attempted to create new law by regulatory fiat, and then started all over against both parties, forcing them both to file new refund claims.

The IRS should not be able to re-start the litigation clock by promulgating an inconsistent regulation when it receives an unfavorable statutory interpretation. Four circuits have already rejected the IRS's position, and it cannot avoid the import of those rulings simply by memorializing that rejected position in a regulation. And it should not be able to forestall this Court's resolution by forcing affected institutions and residents to file repetitive cases in those circuits. While the IRS continues its decades-long crusade to deny medical residents the statutory exemption, the only result will be more litigation costs by educational institutions that can ill-afford them, more billions in refund claims, and continued uncertainty across the country. As Congress itself determined in another context, the costs of defending

litigation involving residency programs "divert[s] the scarce resources of our country's teaching hospitals and medical schools from their crucial missions of patient care, physician training, and medical research." 15 U.S.C. § 37b(a)(1)(E) (involving antitrust litigation). The time has come for this Court to intervene in order to bring uniformity to this important area of law.

II. THE PETITION PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

The issue is also one of national importance. The sheer magnitude of the claims demonstrates the widespread significance of the issue, which affects all or nearly all of the hundreds of medical school and teaching hospitals that sponsor residents and the approximately 100,000 residents whose education they sponsor. Moreover, reflecting their educational mission, residency programs—unlike employment—are accredited by a national education organization, the Accreditation Council of Graduate Medical Education ("ACGME"). ACGME requires that the institutions that sponsor residency programs provide "appropriate financial support and benefits to ensure that residents are able to fulfill the responsibilities of their educational programs." ACGME, *Institutional Requirements* § III.B (www.acgme.org/acWebsite/irc/irc_IRCpr703.asp). Thus, taxing these students as if they were ordinary full-time employees will only decrease the incentives for institutions to sponsor this type of medical training and further burden the students themselves.

Contrary to the IRS's longstanding position, residents are not simply engaging in on-the-job training for long-term employers. Rather, as virtually every court to have considered the issue has

held, residents' long hours are spent on rigorous educational activities sponsored by their universities or teaching hospitals. "It is well-known that the primary purpose of a residency program is not employment or a stipend, but the academic training and the academic certification for successful completion of the program." *Davis* v. *Mann*, 882 F.2d 967, 974 (5th Cir. 1989). Thus, as the district court found in *Mayo I*, no resident has any expectation of continued employment with Mayo following their residencies, and "the residents' purpose in participating in [Mayo's] residency programs was for education and not for earning a living." 282 F. Supp. 2d at 1017. The Mayo residency programs include core curriculum and primary care conferences, grand rounds, morbidity and mortality conferences, and journal clubs. *Id.* at 1016. In all, internal medicine residents are "expected to attend approximately 900 lectures and conferences dedicated to resident training" over three years, which does not even include mandatory daily teaching rounds. *Id.*

The district court below made similar factual findings with respect to the University's residency program. *See* Pet. App. 63a ("residents regularly attended conferences and lectures throughout the week"). Indeed, those educational methods and characteristics are common to residency programs all over the country. There are nearly 8,500 accredited residency programs in the United States providing education to over 107,000 residents. ACGME, *The ACGME's Approach to Limit Resident Duty Hours 2007-08* (www.acgme.org/acWebsite/dutyHours/dh_achievesum0708.pdf). "Residents are first and foremost students, rather than employees, and all accreditation standards and activities reflect this

distinction." ACGME, *Memorandum* (March 1, 2000) (www.acgme.org/acWebsite/reviewComment/rev_residentEmployee.asp). And "the principal classroom for residents must be the clinical setting because patient care in a medical specialty is what residents are receiving training for." *Mayo I*, 282 F. Supp. 2d at 1015. To be accredited, a residency program must have "[r]egularly scheduled didactic sessions" and "[d]idactic and clinical education must have priority in the allotment of residents' time." ACGME, *Common Program Requirements* 6, 11 (2007) (www.acgme.org/acWebsite/dutyHours/dh_dutyhoursCommonPR07012007.pdf). The common educational mission of all accredited residency programs reflects the residents' status as students over anything else.

Given their educational mission, residency programs are not intended to generate profits for their sponsoring institutions. *Cf. Mayo I*, 282 F. Supp. 2d at 1013 n.30 (Mayo "spends more on medical education and research than it receives from patient care"). The students receive limited stipends calculated to maintain "'a minimum standard of living during the period of time that [they] are engaged in their education.'" *United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, No. 02-22715-CIV, 2008 WL 2940669 at *6 (S.D. Fla. July 28, 2008) (citation omitted). In 2008, the average first-year resident received a stipend of approximately $45,000. GAO Report GAO-09-438R at 4 (May 4, 2009) (www.gao.gov/new.items/d09438r.pdf). However, given that the average medical student graduates with $155,000 in student debt, the loan payment alone could reach almost *half* a first-year resident's

monthly stipend income if he or she does not qualify for loan assistance. *Id.*[3]

Given these economic realities, imposing a $700 million annual tax on residency programs—in addition to the substantial costs of further litigating the issue—will further burden residents and leave their institutions with fewer resources to spend on education, research, and patient care. This is especially important now as, based on census data, it has been estimated that the United States will face a severe shortage of doctors in the coming years, and that by 2025 there will be nearly 160,000 fewer physicians than needed to meet demand under the most plausible scenario. See AAMC, *The Complexities of Physician Supply and Demand: Projections Through 2025* at 6 (2008). Combating this expected shortfall will require large increases in residency programs now. This needed expansion, however, will only be hindered if the IRS continues to collect its $700 million tax on residency programs every year, and continues to require institutions and residents to litigate, and then re-litigate, the exemption issue for years or decades to come.

Requiring amici's members to spend considerable resources to continually litigate this issue in circuit after circuit while the courts remain divided will only further exacerbate the financial situation at many institutions that sponsor residency programs. Given the split in the Circuits, residents are now subject to different federal tax regimes depending solely on where they happen to train. It has taken two decades for the question to become ripe for this

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[3] Even if all of a resident's debt is fully eligible for the federal graduated repayment plan, the resident still must spend about 10% of his or her stipend on student loan payments. *Id.*

Court's review. The time has come for the Court to review the issue and bring uniformity to the law.

CONCLUSION

For these reasons, and those in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Court, U.S.
FEB 16 2010
OFFICE OF THE CLERK

No. 09-837

IN THE

Supreme Court of the United States

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH; MAYO CLINIC; and REGENTS OF THE UNIVERSITY OF MINNESOTA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the definition of full time employment in the Treasury Regulation validated by the court below may be applied to health sciences residents and, if so, whether that standard has applicability in determining whether residents are students or employees in other legal contexts.

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INTEREST OF THE BOARD OF AMICUS CURIAE[1]

The Board of Trustees of the University of Illinois (hereinafter the "University") is a body corporate and politic of the State of Illinois originally chartered in 1867 as the state's land-grant university. *See* 110 ILCS § 305/1 et seq. With campuses in Urbana-Champaign, Chicago and Springfield, the University enrolls 70,000 undergraduate, graduate and professional students, and awards 18,500 degrees annually. It has a $4.2 billion annual operating budget, including $645 million in sponsored research, ranking it among top research-intensive universities in the country. Its Health Sciences Center is comprised of Colleges of Medicine, Dentistry, Pharmacy, Public Health, Applied Health Services, and Nursing, making it one of only seven academic health centers across the country to include a full complement of health sciences curricula on one campus. Solely to support its educational and public services missions, the University operates a 483-bed tertiary care hospital with 19,924 admissions per year, and an outpatient clinic providing more than 440,000 outpatient visits per year.

The University's College of Medicine is the largest medical school in the country with an enrollment of 1,382 medical students. It also conducts postgraduate (post

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. The Petitioners have filed a blanket consent and the consent of the Respondent is being submitted herewith. The parties have been given at least 10 days notice of amicus' intention to file.

M.D. degree) medical resident education programs for 1,163 residents in 69 different medical specialties and sub-specialties. Each residency is accredited by the Accreditation Council for Graduate Medical Education. Much of that postgraduate medical resident education occurs in the University of Illinois Hospital, but also at University sites in Peoria, Rockford, and Urbana, Illinois. The University's College of Dentistry has 320 dental students and conducts 6 postgraduate (post D.D.S.) dental education residency training programs for 90 dental residents. Its programs are accredited by the Commission on Dental Accreditation. Considering the postgraduate health sciences residency programs of the Colleges of Medicine and Dentistry together, the University conducts one of the largest health sciences postgraduate resident education programs in the country.

The University is interested in the outcome of this Petition because it has been involved in a multi-year dispute with the Illinois Department of Unemployment Compensation (hereinafter "IDES") concerning whether its health sciences residents, both medical and dental, are eligible for unemployment compensation upon dismissal from or completion of their residencies. Recently, IDES found one of the University's ex-residents eligible based upon the Treasury Regulation relied on in the decision below.[2] It is expected that, if the decision below stands, IDES will continue to rely on the Treasury Regulation and the University will resultantly incur significant costs in the future in paying unemployment compensation to its departed health sciences residents.

[2] Treas. Reg. § 3121(b)10)-2(c)-(d)(e)(2004)

REASONS FOR GRANTING THE PETITION

Apart from the conflicts between the Circuits and the importance of the question involved as described by the Petitioners, this Court should grant the petition for a writ since this case has far-reaching jurisprudential significance outside the confines of the Federal Insurance Contribution Act ("FICA") and its definition of "student" as codified in 26 U.S.C. § 3121(b)(10). As stated above, in Illinois, the reasoning in the decision below and the Treasury Regulation has been used by IDES as a basis to find that student exceptions in the Illinois Unemployment Compensation Act do not cover the education of health science residents by the University, principally because they spend more than 40 hours per week in educational activity, the benchmark employed in the Treasury Regulation.

By way of background, in 1937 Illinois enacted the Illinois Unemployment Insurance Act, 820 ILCS § 405/100, establishing a system of weekly benefits payable to unemployed workers if terminated from employment due to no fault of their own. Funding of benefits is through charges to employers, in the case of state workers through a separate appropriation. 820 ILCS § 405/1403. Practically speaking, the University funds benefits awarded to its former employees by making contributions to IDES. Benefits are paid based on "wages" earned, including every form of "remuneration for personal services." 820 ILCS §§ 405/234, 405/500E. There are numerous exceptions to "wages" earned for benefits purposes, including for services of students performed in the employment of a school, college, or university, 820 ILCS § 405/224; services by students in

programs which combine academic instruction with work experience, 820 ILCS § 405/227; and services by an "'intern' . . . in the employ of a hospital. . . . ," 820 ILCS § 405/230. Further, "wages" do not include financial assistance under any student aid program administered by an agency of the government received by a person who is enrolled as a full-time or part-time student at any public or private university. 820 ILCS § 405/401.5.

Applicants denied benefits under the statutory scheme or employers ordered to pay benefits have the right to protest and to a review through a multi-step process leading to a decision by a hearing officer known as a "referee," 820 ILCS § 800, and then to a board of review, the final step before administrative review in state court. 820 ILCS § 803.

In recent years, health sciences residents in several different states have applied for and have been awarded unemployment benefits upon termination from residency training based on the erroneous conclusion that they are workers engaged in gainful employment for the hospital in which residency education occurs. *See, e.g., Unemployment Compensation Bureau v. Detroit Medical Center*, 267 Mich. App. 500 (Mich. Ct. App. 2005). They have done so either after they fail to progress academically or after they complete the program and graduate.

The University has recently experienced a number of such filings and has contested the residents' applications for benefits because of the added financial burden associated with paying these benefits and in

apprehension that this practice may become widespread. Results of the University's protests demonstrate the impact of the decision below on this issue. In a decision reached by IDES Hearing Referee David W. Ott on November 12, 2008, before the decision below, IDES supported the University's appeal, finding that the stipend paid to the resident in that case was not in the form of "wages" under the Illinois Unemployment Act. (See Appendix A). However, after the decision below, on December 17, 2009, IDES Hearing Referee William Naurich, specifically relying on the Treasury Regulation and implicitly the thinking of the Eighth Circuit, confirmed the award of unemployment benefits to another health services resident. (See Appendix B). Tracking the wording of the Regulation, Referee Naurich stated:

> The services of a full-time employee are not incident to and for the purpose of pursing a course of study. The determination of whether and (sic) employee is a full-time employee is based on the employer's standards and practices, except regardless of the employer's classification of the employee, an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee . . . The determination of an employee's normal work schedule is not affected by the fact that the services performed by the employee may have educational, instructional, or training aspect.

Remarkably, IDES took this position even though the Seventh Circuit Court of Appeals in *University of*

Chicago Hospitals v. United States, 545 F.3d 564 (7th Cir. 2008), cast serious doubt on the validity of the Treasury Regulation insofar as it provides a definition of "student" for FICA purposes. Had Referee Naurich followed the thinking in *University of Chicago Hospitals*, he should have reached the opposite conclusion and declined to award unemployment benefits to the University's ex-resident.

Considering the aforedescribed development in the context of unemployment benefits, it is foreseeable that the extremely narrow definition of "student" as contained in the Treasury Regulation could be employed in still other legal contexts to argue for reclassification of health science residents as workers, not students. This could be particularly so in recurring cases concerning judicial abstention in review of academic decision making. *See Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985). Frequently that issue arises in cases concerning the scope of due process rights in the context of an academic decision to terminate a student, *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978), including academic decisions about health sciences residents. *See Fenje v. Feld*, 398 F.2d 620 (7th Cir. 2005) (decision to deny a prospective resident the right to matriculate based on false statement was academic); *Shaboon v. Duncan*, 252 F.3d 722 (5th Cir. 2001) (resident's failure to address mental problems furnished academic basis for dismissal); *Davis v. Mamm*, 882 F.2d 967 (5th Cir. 1989) (resident's dismissal from residency training was academic decision). Were residents to be regarded as employees in cases involving decisions to dismiss or terminate them, then the outcome of these cases could be dramatically different.

Considering the potential impact of the Treasury Regulation as outlined above, it is critical that this Court resolve the conflict between the circuits described by the Petitioners, hopefully in a way which recognizes that residents are students enrolled in an educational program, not employees hired to perform gainful services. Such a result is merited because the record before the district court demonstrates that the Treasury Regulation's arbitrary and irrational application of a "40 hour rule" to the educational pursuits of health sciences residents is erroneous and unsupportable and that the Treasury Regulation is invalid for that reason. It is also invalid because it ignores the overwhelming evidence included in the record below that, while the training of health sciences residents is unquestionably intense, its purpose is singularly educational with no aspect of gainful employment.

The experience of the University in its ongoing dispute with IDES shows that the Treasury Regulation, and implicitly the thinking in the decision below, can be used in unanticipated ways to resolve the question of whether a resident is a student or employee in legal contexts other than just FICA withholding. That thinking could affect other contexts where the legal status of a resident is relevant to the outcome. Therefore, this Court should grant the petition.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE STATE OF ILLINOIS, DEPARTMENT OF EMPLOYMENT SECURITY, APPEALS DIVISION DATE OF HEARING SEPTEMBER 22, 2008 & OCTOBER 31, 2008

STATE OF ILLINOIS
DEPARTMENT OF
EMPLOYMENT SECURITY
APPEALS DIVISION
DECISION

APPEAL DOCKET AR-8900142A INTERSTATE

LOCAL OFFICE: 008

CLAIMANT:

Chantiste Beal
12115 2nd Avenue
Lynwood CA 90262-4561

EMPLOYER: (APPELLANT)

C/O Norman Jeddeloh/Arnstein & Lehr
The Board of Trustees of the University of Illinois
120 S Riverside Plaza Suite 1200
Chicago IL 60606-3910

DATE OF HEARING: 9/22 & 10/31/08

APPEARANCES/ISSUES/EMPLOYER STATUS: The claimant and the employer appeared and testified at the hearing. The employer was represented by legal

counsel. The issues are: Was the remuneration received "wages" within the meaning of the Illinois Unemployment Insurance Act? See IUIA Section 234 and the exceptions thereto. Was the claimant's principal occupation that of a student for the relevant period, as defined by Section 500C4 of the Illinois Unemployment Insurance Act? The employer is a party to this appeal.

FINDINGS OF FACT: By way of background, the claimant was a resident at the University of Illinois at Chicago's College of Dentistry starting about July 1, 2006. This was a four year program intended to prepare her to practice as an Oral & Maxillofacial Surgeon. In August 2007 the College of Dentistry discharged her from the residency program because she failed to complete successfully the anesthesia portion of the program. She filed a claim for unemployment benefits. The Local Office allowed her benefits. The Board of Trustees appealed. Administrative Law Judge Barbara Heathfield affirmed the Local Office in a decision issued under Docket No. AR-7048507A.

In this appeal the Board of Trustees contends that the claimant had no base period wages for the unemployment claim she filed in 2007. Under Section 500E of the Illinois Unemployment Insurance Act a claimant needs a certain amount of wages in her base period in order to be eligible for unemployment benefits. If the Board of Trustees is correct and the payments the claimant received from the College of Dentistry during the residency program were not wages, she was not eligible for the unemployment benefits Judge Heathfield allowed her.

Appendix A

She received a Doctor of Dental Medicine degree from the University of Pennsylvania in May 2005. She served a one year residency starting in July 2005 at a hospital in Texas. The University of Illinois at Chicago's College of Dentistry admitted her into its residency program after that. Each year she entered into a contract with the College of Dentistry for her participation in the program. The contract covering July 1, 2006-June 30, 2007 is the only one relevant to this appeal because that year also happened to be the claimant's base period. That agreement addressed the claimant's "participation in the College of Dentistry graduate medical education and clinical training program." It required the College of Dentistry to pay her $39,240 a year in monthly installments while she attended the residency program. The agreement set forth duties on the part of the claimant and the College of Dentistry. The College of Dentistry had to "provide an educational program in graduate medical education" that met certain standards. The College of Dentistry also must "fulfill the educational and clinical requirements and graduate clinical training programs" that met certain other standards.

The claimant's duties under the contract required her "to fulfill the educational clinical requirements of the dental residency training programs." In addition to a number of other duties relating to her participation in the program, the agreement required her "to provide safe, effective and compassionate patient care whenever assigned or assumed." She also had "to complete an operative report for each patient assigned to [her]" and

"to complete a discharge summary for each patient assigned to [her]." She had to give a copy of the discharge summary to the hospital where the College of Dentistry assigned her. The failure to complete any required medical record could result in discharge from the residency program or her failure to receive a certificate of completion of the program. (Her discharge from the program had nothing to do with patient care or failure to prepare medical documents.)

The employer's witnesses credibly testified that the entire purpose of the claimant's residency program was to educate her, not provide services to patients. The money that the College of Dentistry paid her was not for her services. This was money the College of Dentistry received from Medicare. Medicare provided this money for residency programs to promote medical education. Medicare wanted properly trained doctors that residency programs provided. Although the claimant saw patients as part of the residency program, the purpose of this was so the College of Dentistry could evaluate her on how she performed medical or dental procedures in real life situations. She had a Temporary Dental Training License she obtained through the College of Dentistry that allowed her, by its terms, "to perform such acts as may be prescribed by, and incidental to, such program of ORAL AND MAXILLOFACIAL SURGERY but not otherwise to engage in the practice of dentistry unless fully licensed." She had no other license.

Appendix A

There was a formal agreement between the College of Dentistry and the UIC Hospital and clinics where the claimant saw patients. This allowed residents to see patients in these facilities as part of their residency program. The UIC Hospital and clinics did not need residents for patient care. They had fully licensed personnel to do this. They only allowed residents to see patients as part of their training so they could increase their skills and allow the College of Dentistry to evaluate their patient skills. The limiting language in the claimant's Temporary Dental Training License confirms this.

CONCLUSION: Section 234 of the Illinois Unemployment Insurance Act provides, subject to exclusions, that "wages" means every form of remuneration for personal services.

The Administrative Law Judge finds that the money the claimant received from the College of Dentistry was not wages within the meaning of Section 234. Section 234 defines "wages" as "every form of remuneration for personal services." Her eligibility for unemployment benefits depends on whether she earned "wages" for services she provided to an employer.

Just because the College of Dentistry gave her money during the base period did not make the College of Dentistry her employer and did not make the money she received wages. Her arrangement with the College of Dentistry was not the usual employer-employee relationship seen in unemployment claims. She did no

work for the College of Dentistry. She was a student. The College of Dentistry did not pay her for services she performed for the College of Dentistry or for patient care. It gave her money to live on while participating in a full time educational program. Colleges commonly give students scholarships, asking nothing in return except that they participate in an educational program. The claimant's arrangement with the College of Dentistry was nothing more than this. There was no employment relationship.

Because of these considerations, the money she received from the College of Dentistry was not wages within the meaning of Section 234. She is not eligible for unemployment benefits because she did not have any wages in her base period as Section 500E requires before she can collect benefits.

There were references in the appeal file to exclusions from the definition of employment. Work that claimants do within these exclusions does not allow them to collect unemployment benefits. Although none of these exclusions is important because the Administrative Law Judge has already decided that the money the claimant received from the College of Dentistry was not wages, the Administrative Law Judge will briefly address them in case the Board of Review considers them significant.

Section 224 says that employment does not include work by a student for a school where she is enrolled. Section 224 does not apply here because the claimant, although she was enrolled in and attending classes at the College

of Dentistry, was not providing services to the College of Dentistry. She was just participating in the educational program.

Section 227 says that work done by a student participating in a work experience program is not employment. Although a number of criteria for this statute to apply are present in this appeal, a commonsense interpretation of the exclusion shows that it does not apply here. The common scenario in appellate level cases discussing the statute is that a student works for a private employer separate from the school she attends. When her work ends she makes a claim for unemployment benefits based on her separation from that work. Courts have explained that the purpose of this exclusion is to avoid discouraging businesses from participating in such programs by exposing them to unemployment insurance liability. Here, the only entity facing exposure to an unemployment claim is the College of Dentistry, which was the only one giving her any money. No other entity faces exposure.

Finally, Section 230 excludes interns "in the employ of" a hospital from getting unemployment benefits. The claimant, having served a one year internship elsewhere before she enrolled in the College of Dentistry's residency program, was not an intern. Nor was she in the employ of UIC Hospital, which did not pay her for her services or for anything else.

For these reasons, none of these exclusions apply here.

Appendix A

Section 500C4 of the Illinois Unemployment Insurance Act provides that an individual shall be deemed unavailable for work with respect to any week in a period when the individual's principal occupation is that of a student in attendance at, or on vacation from, a public or private school.

The claimant was not a student during the benefit period at issue, from August 11, 2007 through August 9, 2008. Therefore, she is eligible for unemployment benefits under Section 500C4.

DECISION: The determination of the Local Office is SET ASIDE. Under Sections 234 and 500E of the Illinois Unemployment Insurance Act, eligibility for benefits is denied, as to this issue only, from August 12, 2007 through August 9, 2008.

The determination of the Local Office is AFFIRMED. Under Section 500C4 of the Illinois Unemployment Insurance Act, eligibility for benefits is allowed, as to this issue only, from August 11, 2007 through August 9, 2008.

DWO

DAVID W. OTT, Hearings Referee
(Administrative Law Judge) 503

APPENDIX B — DECISION OF THE STATE OF ILLINOIS, DEPARTMENT OF EMPLOYMENT SECURITY, APPEALS DIVISION DATE OF HEARING NOVEMBER 12, 2009

STATE OF ILLINOIS
DEPARTMENT OF EMPLOYMENT SECURITY
APPEALS DIVISION
ADMINISTRATIVE LAW JUDGE DECISION

APPEAL DOCKET AR-9059726A

LOCAL OFFICE: 011

CLAIMANT:

Veronica L Murphy
2448 W.Flournoy #3
Chicago IL 60612

EMPLOYER: (APPELLANT)

Board Of Trustees University Of I
715 South Wood Street M/C 900
Chicago IL 60612-7205

DATE OF HEARING: November 12, 2009

APPEARANCES/ISSUES/EMPLOYER STATUS: The employer appeared and testified; the claimant did not appear. The employer was represented by legal counsel. The issue is: Was the claimant eligible for benefits by reason of wages paid during the base period under the Act? See IUIA Sections 701 and 500E. The employer is a party to this appeal.

Appendix B

FINDINGS OF FACT: The claimant was a doctor who earned a stipend while performing certain medical services in conjunction with training and evaluation with the goal of progressing enough in the medical field to be able to practice medicine without the necessity of supervision.. The program is a four year program with each successive year expected to show progress towards being able to practice medicine t without supervisor. The claimant was dropped from the program because she did not progress as expected.

CONCLUSION: Section 234 of the Illinois Unemployment Act defines wages as "remuneration for personal services including salaries, commissions, bonuses and the reasonable money value of all remuneration in any medium other than cash."

In *Bingler v. Johnson*, 394 U.S. 741, 89 S. Ct. 1439 (1969) the Supreme Court found that for federal tax purposes, it must be shown both that the payment is educational in nature and does not represent a *quid pro quo* for services rendered.

Section 224 of the Act provides:

> The term "employment" shall not include services performed in the employ of a school, college, or university . . . by a student who is enrolled and is regularly attending classes in such school, college or university. . . .

Appendix B

Current IRS regulations provide:

(d)(3) An employee's services must be incident to and for the purpose of pursing a course of study in order for the employee to the status of a student.

(iii) The services of a full-time employee are not incident to and for the purpose of pursuing a course of study. The determination of whether and employee is a full-time employee is based on the employer's standards and practices, except regardless of the employer's classification of the employee, an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee. . . . The determination of an employee's normal work schedule is not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect.

DECISION: The determination of the Local Office is AFFIRMED. Under Section 234 and 500E of the Illinois Unemployment Insurance Act, the claimant's earnings were wages.

WPN

WILLIAM P. NAURICH, Hearings Referee 533

AMICUS CURIAE BRIEF

No. 09-837

IN THE

Supreme Court of the United States

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH; MAYO CLINIC; AND REGENTS OF THE UNIVERSITY OF MINNESOTA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF GEORGETOWN UNIVERSITY, LOYOLA UNIVERSITY MEDICAL CENTER, SAINT LOUIS UNIVERSITY, UNIVERSITY OF ARKANSAS, UNIVERSITY OF NORTH DAKOTA, UNIVERSITY OF ROCHESTER, THE UNIVERSITY OF TENNESSEE, AND VANDERBILT UNIVERSITY AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Georgetown University, Loyola University Medical Center, Saint Louis University, University of Arkansas, University of North Dakota, University of Rochester, The University of Tennessee, and Vanderbilt University (hereinafter referred to collectively as the "Universities") are institutions of higher education and one hospital that conduct graduate medical residency programs in substantially the same manner as the programs conducted by the Petitioners in this case. In this connection, the medical residents who participate in the Universities' medical residency programs receive annual stipends that are subject to social security taxation unless the 26 U.S.C. § 3121(b)(10) Student Exception to the Federal Insurance Contribution Act ("FICA") applies. In addition, the Universities, or in some cases the hospitals that participate in the Universities' medical residency programs, are likewise subject to social security taxation unless the Student Exception applies.

The financial impact of the issue raised by this case on the Universities, their participating hospitals, and their medical residents is substantial.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief, and the parties have consented to the filing of this brief. A*mici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

The Universities, which individually operate dozens of different medical residency programs, have, collectively, approximately 4,500 medical residents who receive a total of over $200 million in annual stipend payments. The social security/Medicare tax imposed by 26 U.S.C. §§3111(a) and (b) on the stipends paid to these medical residents is obviously a significant cost element for the Universities, their participating hospitals, and the medical residents.

Thus, the Universities have a vital interest in the issue before the Court in this matter.

Pursuant to this Court's Rule 37.2(a), counsel of record in this case received timely notice of the Universities' intent to file this brief, and all parties consented to the filing of this brief with the Court.

SUMMARY OF ARGUMENT

This case involves an interpretation of the 26 U.S.C. § 3121(b)(10) Student Exception, which exempts from the definition of "employment" for social security taxation purposes "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university." The Treasury Department, however, in Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) has categorically excluded all full-time employees, including medical residents, as being able to qualify as "students" for purposes of the Student Exception regardless of the nature and extent of the educational activities in which the individuals may be engaged. The Eighth Circuit in the case below upheld the validity of this regulation,

and the Petitioners have asked the Court to hear this case and review the Eighth Circuit's decision and the validity of this regulation.

Petitioners set forth in their brief compelling legal reasons for granting *certiorari* in this case. The Universities will not restate these arguments, but will instead explain why the medical residents who participate in the Universities' residency programs are clearly students and how the Treasury regulation is therefore contrary to the unambiguous statutory language of 26 U.S.C. § 3121(b)(10).

In addition, the Universities will present for the Court's consideration two arguments why Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) should be declared invalid – first, because the Treasury Department should not be permitted by regulatory fiat to overturn judicial decisions in four circuit courts of appeal, and secondly, because the regulation, being inconsistent with a longstanding existing Social Security Administration regulation, may result in medical residents being subject to social security tax but ineligible for corresponding social security benefits.

ARGUMENT

I. Because Medical Residents Are "Students," Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) is Contrary to the Unambiguous Language of 26 U.S.C. § 3121(b)(10)

The Eighth Circuit decision in the case below validates a Treasury regulation that categorically excludes medical residents from the definition of "students" for purposes of the Student Exception. But as institutions that operate medical residency programs, the Universities are in a unique position to advise the Court that from the Universities' standpoint the medical residents enrolled in their residency programs are clearly "students" within every meaning of that term.

The Student Exception clearly and unambiguously exempts from social security taxation "students" who meet certain other criteria. By categorically excluding medical residents enrolled in the Universities' medical residency programs from qualifying as "students" even if the other statutory criteria are met, the Treasury regulation violates and is contrary to the clear and unambiguous language of the Student Exception in the same manner as if the Treasury Department had attempted to exclude full-time college sophomores. The Universities submit that the Court should agree to hear this case to enforce the unambiguous statutory language of the Student Exception and to give the medical residents enrolled in the

Universities' residency programs the opportunity to demonstrate why they are indeed students.

In this connection, it is difficult to overstate how strongly the Universities view the medical residents participating in their residency programs as "students." Medical residents fit squarely within the commonly understood definition of a student cited by Petitioners at p. 17-18 of their brief: "a person engaged in study . . . esplecially] one who attends a school" (*Webster's New International Dictionary* 2502 (2d ed. 1954)), or a person who engages in "study" by applying the mind "to the acquisition of learning, whether by means of books, observation, or experiment." (*Oxford Universal Dictionary* 2049-50 (3d ed. 1955)).

Like any student at any educational institution, medical residents attend medical lectures, read assigned texts, sit for written examinations to test the extent and depth of their learning, engage in research on medical-related topics, and participate in journal clubs.

In addition, residents provide patient care; however, all patient care-related activities are conducted as part of a structured teaching and learning environment. Patient care is provided only under the supervision of attending physicians, and residents participate in didactic sessions during rounds. Medical residents are being taught by the medical school faculty to operate as independent physicians, and all patient care activities in which residents are engaged are training and learning activities expressly intended to achieve that goal.

Medical schools make every effort to ensure that their residents engage only in those patient care activities that further the educational training mission and that residents do not frequently if at all engage in routine activities, such as drawing blood and taking blood pressure readings.

Whenever a resident is providing patient care services, the resident is learning in the time-honored manner of a student apprentice learning any craft. The manner in which a resident provides patient care services differs markedly from the manner in which patients are treated by attending physicians, and these differences reflect the "learning by doing" nature of the medical resident's education and training. For example, a resident may take a patient history, thereafter reviewing it with the supervising physician, and the supervising physician will return with the resident to complete the examination. This is quite different from the process of an examination undertaken by someone who already is a qualified attending physician.

The Accreditation Council on Graduate Medical Education ("ACGME"), the organization that accredits medical residency programs, requires each residency program to have an educational curriculum that contains (1) overall educational goals for the program; (2) competency-based goals and objectives for each residency assignment at each level of training; and (3) delineation of resident responsibility for patient care, including a plan for progressive responsibility for patient management and supervision of residents over the continuum of

the program.[2] In addition, all medical residency programs must comply with certain ACGME "competencies," which include ensuring that residents demonstrate (1) medical and clinical knowledge and the ability to apply this knowledge to patient care; (2) the development of skills to investigate and evaluate care of patients; (3) interpersonal and communication skills to be able to exchange information with patients, their families, and other health care professionals; and (4) a commitment to carrying out professional responsibilities and ethical principles.[3]

Thus, the Universities, as institutions that conduct medical residency programs, submit for the Court's consideration their considered opinion that all of the activities conducted by medical residents participating in their residency programs – whether they be traditional educational activities or patient care-related activities conducted in an apprenticeship capacity under the supervision of attending physicians – are learning activities engaged in by "students" as that term is and has always been commonly understood. By categorically excluding medical residents from "student" classification, Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) is therefore contrary to the unambiguous language of 26 U.S.C. § 3121(b)(10) that exempts "students" from social security taxation.

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[2] ACGME Common Program Requirements, effective July 1, 2007, § IV.

[3] *Id.*

II. The Treasury Department Should Not Be Permitted By Regulation to Change an Unambiguous Statutory Provision and Effectively Reverse the Previous Decisions of Four Circuit Courts of Appeal

The government has for many years taken the administrative position that medical residents are ineligible for the benefits of 26 U.S.C. § 3121(b)(10) on the ground that they are not "students." It initially based its position on the facts and circumstances of the medical residents' relationship to the institution at which the residents worked and trained, arguing that these facts demonstrated that the residents were primarily "employees" and not "students."[4]

The government then changed tactics and argued that there is no need to examine the facts and circumstances of the medical residents' relationship to the institution because, based on the legislative history of 26 U.S.C. § 3121(b)(10), medical residents are ineligible for the Student Exception as a matter of law. The courts have consistently rejected this argument and concluded that the student/employee determination must be made by an

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[4] This is the position asserted by the government in *Minnesota v. Apfel*, 151 F.3d 742 (8th Cir. 1998). *See also*, Chief Counsel Advice 200029030 (July 21, 2000) and Field Service Advice 200041002 (Jan. 24, 2000) (holding that medical residents are not students under a student v. employee facts and circumstances test).

examination of all of the relevant facts and circumstances.[5]

Thus, faced with the prospect of having to engage in a detailed factual litigation of perhaps thousands of FICA tax refund cases and with the real possibility of not prevailing in this litigation, the government changed tactics a third time and amended the Treasury regulations to create a bright-line test that excludes medical residents from qualification under of 26 U.S.C. § 3121(b)(10) – a result it failed to lawfully achieve through the civil court system. And to make absolutely sure that it achieved the purpose of overruling the circuit courts that had fully considered this issue, it included in these new regulations an example specifically concluding that medical residents do not qualify.[6]

The government should not be permitted to contort the tax laws in this manner, particularly in a case, such as this, where the courts have previously and clearly held, in the context of determining whether the statute can be interpreted though the use of legislative history, that the statute is unambiguous on the question of whether medical residents can qualify for its benefits. As this Court said: "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court

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[5] *United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248 (11th Cir. 2007); *United States v. Mem'l Sloan-Kettering Ctr.*, 563 F.3d 19 (2d Cir. 2009); *United States v. Detroit Med. Ctr.*, 557 F.3d 412 (6th Cir. 2009); *Univ. of Chi. Hosps. v. United States* 545 F.3d 564 (7th Cir. 2008).

[6] Treas. Reg. § 31.3121(b)(10)-2(e), Example (4).

decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[7] Here, we submit, four circuit courts have held that 26 U.S.C. § 3121(b)(10) unambiguously includes medical residents within its scope (provided that they can meet the other statutory requirements) and therefore these judicial decisions "trump" the Treasury Department's full-time employee regulation that creates an irrebutable presumption to the contrary.

The Eighth Circuit very briefly addressed this issue but summarily dismissed it, saying that the Supreme Court "has repeatedly held that agencies may validly amend regulations to respond to adverse judicial decisions, or for other reasons, so long as the amended regulation is a permissible interpretation of the statute." The Universities submit for the reasons previously stated that Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) is not a valid interpretation of 26 U.S.C. § 3121(b)(10), and moreover contend that the cases cited by the Eighth Circuit panel as support for the "adverse judicial decisions" proposition do not do so.

The two Supreme Court decisions cited by the panel – *Dickman v. Commissioner*, 465 U.S. 330 (1984) and *Morrissey v. Commissioner*, 296 U.S. 344 (1935) – do not support this position. *Dickman* did not involve the amendment of a Treasury regulation issued in response to an adverse court decision; rather, it involved a change in the Commissioner's

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[7] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

"administrative practice." The regulation in question in that case was "virtually identical to those in effect during the prior five decades."[8] And, in *Morrissey* the Court upheld the Commissioner's amended regulation that conformed the definition of an "association" for income tax purposes to the definition of the same term for excise tax purposes articulated in a Supreme Court case. In other words, the regulatory amendment at issue in *Morrissey* was made to conform the regulation to a favorable judicial decision, not in response to an unfavorable decision.

Norwest Corp. v. Commissioner, 69 F.3d 1404 (8th Cir. 1995) and *McNamee v. Dep't of the Treasury*, 488 F.3d 100 (2d Cir. 2007) are equally unpersuasive. *Norwest* involved a regulation that, an amicus argued, reflected an "abrupt shift in the Commissioner's position." And the issue in *McNamee* was a proposed regulation that, if and when promulgated, would have changed the Commissioner's approach reflected in an existing regulation. In neither case, however, was the new regulation in question issued in response to adverse judicial decisions.

Thus, pursuant to the standard set forth by this Court in *Nat'l Cable & Telecomms. Ass'n*, Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) should be declared invalid because the regulation effectively reverses decisions reached by four different circuit courts of appeal. The Treasury Department should not be

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[8] *Dickman*, footnote 11.

permitted to administer the tax laws in such a manner.

III. Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) is Invalid Because It May Result in Medical Residents Being Subject to Social Security Tax but Ineligible for Corresponding Social Security Benefits

As further evidence of the invalidity of Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii), the regulation is inconsistent with a previously issued and virtually identical regulation promulgated by the Social Security Administration ("SSA"), and allowing the Treasury regulation to stand together with the SSA regulation may mean that medical residents will be subject to social security taxation but will not be eligible for social security benefits related to the taxes paid. This is because the Treasury regulation interprets the term "student" for tax purposes in a manner different from the manner in which applicable SSA regulations interpret the exact same term.

Longstanding SSA regulations, adopted under a provision of the Social Security Act ("Act") identical to the Student Exception, apply to social security benefits.[9] The SSA regulations provide with respect to "student" status: "Whether you are a student for purposes of this section depends on your relationship with your employer. If your main purpose is pursuing a course of study rather than earning a livelihood, we consider you to be a student and your

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[9] See 42 U.S.C. § 410(a)(10); 20 C.F.R. § 404.1028.

work is not considered employment." 20 C.F.R. § 404.1028(c). From 1940 to 2004, the SSA regulations and the IRS regulations under the Student Exception were substantially identical.[10]

The adoption in 2004 of the amendments to the Treasury regulations interpreting the Student Exception, however, has caused the Treasury and the SSA regulations to define "student" differently. As a result, it is now possible for an employee to qualify as a "student" under the SSA regulations but not under the Treasury regulations because of the inclusion of the Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) "full-time employee" rule. "Full-time" student-employees to whom this regulation applies, but who, like medical residents, meet the SSA regulatory test of having as their "main purpose . . . pursuing a course of study rather than earning a livelihood," will be subject to social security taxation. But these persons may not receive social security benefit credits corresponding to the taxes paid

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[10] When adopted in 1940, the SSA regulations were identical to the Treasury regulations adopted in that year. See 5 F.R. 1849, 1877 (1940) (codified at 42 C.F.R. § 402.817). Their language remained substantially identical through 1979. Compare 20 C.F.R. § 404.1019 (1979) (Social Security Act regulation) with Treas. Reg. § 3121(b)(10)-2 (1979) (Internal Revenue Code regulation). In 1980, the SSA regulations were "rewritten and reorganized" to make them "clearer and easier for the public to use." 45 F.R. 20074 (Mar. 27, 1980). The changes were thus formal rather than substantive, and no further change has been made in the SSA regulations. The Internal Revenue Code regulation was not changed after 1979 (until its amendment in 2004).

because they qualify as "students" under the SSA regulations and are therefore ineligible to receive social security benefits.

The Treasury Department has acknowledged that the social security tax provisions of the Internal Revenue Code and the social security benefit provisions of the Act must be symmetrical to yield consistent social security results. In its Explanation of the amendments of the Student Exception regulation proposed in 2004, it stated:

> Wage and employment questions affect both social security benefits entitlement and FICA taxes which fund the social security trust fund. Except in unusual circumstances, the Social Security Act, and the Internal Revenue FICA provisions, are to be read in pari materia. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001). Thus, whether certain service is employment affects not just FICA taxation, but also social security benefits eligibility and level of benefits. Moreover, the integrity of the social security system requires symmetry between service that is considered employment for social security benefits.

REG-156421-03, 69 F.R. 8604, 8605 (Feb. 25, 2004), 2004-1 C.B. 571, 572.[11] Cf. *Rowan Companies v. United States*, 452 U.S. 247, 253 (1981) (Treasury regulations that defined "wages" differently for social security and unemployment tax purposes than for income tax withholding purposes were invalid because they "fail to implement the congressional mandate in a consistent and reasonable manner").[12]

Forced to choose between inconsistent regulations interpreting identical statutory terms in a case where symmetry is required for the effective administration of a single program, the Court should prefer the SSA regulations over the amended Treasury regulations. The Treasury regulations and the SSA regulations were substantially identical until the Treasury's pre-April 1, 2005 regulations were superseded by the amended regulations in

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[11] See also Joint Committee on Taxation, Staff Report on Options to Improve Tax Compliance and Reform Tax Expenditures, Jan. 27, 2005, at 83 (Social Security Act provides exceptions to "wages" and "employment" that "parallel" FICA tax exceptions; compensation or services not subject to FICA tax therefore are also not taken into account in determining social security benefits).

[12] The Supreme Court has recently stated that it relied in *Rowan* upon a manifest "congressional concern for the interest of simplicity and ease of administration." *Environmental Defense v. Duke Energy Corp.*, 167 L. Ed. 2d 295, 308 (2007), quoting *Rowan*, *supra*, 452 U.S. at 255. The justification for uniformity in the present case is similarly compelling because, as the Treasury Department acknowledged in its Explanation of the proposed regulatory amendments (quoted *supra*), the "integrity" of the social security system requires "symmetry" in the definitions of employment for benefits and taxation purposes.

2004. Thus, the amended regulations are entitled to minimal deference vis-à-vis the SSA regulations for the same reasons that the district court in this case determined that the amended regulations were entitled to minimal deference in relation to the pre-April 1, 2005 Treasury regulations. See Pet. App. 37a – 38a.

Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) is therefore invalid because, by expressly excluding medical residents from being classified as "students," the regulation will subject the residents to social security tax and may therefore conflict with longstanding SSA regulations that would deny residents social security benefits related to the taxes paid because, under those regulations, the residents would qualify as "students."

CONCLUSION

For the reasons set forth above, the Universities respectfully request the Court to grant certiorari in this case and declare Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) invalid.

Respectfully submitted,

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JOINT APPENDIX

Supreme Court, U.S.
FILED
AUG 6 - 2010
OFFICE OF THE CLERK

No. 09-837

IN THE

Supreme Court of the United States

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH; MAYO CLINIC; AND REGENTS OF THE UNIVERSITY OF MINNESOTA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JANUARY 14, 2010
CERTIORARI GRANTED JUNE 1, 2010

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Affidavit of Roger L. Nelson in Support of Motion for Summary Judgment (Doc. 18) (Apr. 2, 2007), Attachment to Brief of the United States, *Mayo Found. for Med. Educ. & Research* v. *United States* (8th Cir. filed Dec. 26, 2007) (No. 07-3242) 20a

Brief of the United States, *Regents of Univ. of Minn.* v. *United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193) 23a

Exhibits to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn.* v. *United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

Deposition of Hennepin County Medical Center (Dr. Michael Belzer) (Dec. 21, 2007) (Ex. 1) 25a

Government Exhibit 162, Attachment to Deposition of Hennepin County Medical Center (Dr. Michael Belzer) 38a

Deposition of Allina (Dr. Terrill Rosborough) (Dec. 12, 2007) (Ex. 2) 45a

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Government Exhibit 151, Attachment to Deposition of HealthPartners (Dr. Carl Patow) 56a

Deposition of Fairview (Dr. Gordon Alexander) (Dec. 11, 2007) (Ex. 4) 66a

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Exhibits to Supplemental Affidavit of Kristina W. Carlson in Support of Motion for Summary Judgment (Doc. 65) (Jan. 7, 2008), Attachment to Brief of Univ. of Minn., *Regents of Univ. of Minn.* v. *United States* (8th Cir. filed Sept. 26, 2008) (No. 08-2193)

Deposition of Dr. Bradley Benson (Nov. 8, 2007) (Ex. 3) 187a

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Deposition of Fairview (Dr. Gordon Alexander) (Dec. 11, 2007) (Ex. 7) 201a

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Graduate Medical Education Program Residency/Fellowship Agreement, Addendum to Brief of the United States, *Regents of Univ. of Minn.* v. *United States* (8th Cir. filed Sept. 26, 2008) (No. 08-2193) 209a

Reply Brief of the United States, *Regents of Univ. of Minn.* v. *United States* (8th Cir. filed Oct. 9, 2008) (No. 08-2193) 219a

The following opinions and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari:

Opinion of the United States Court of Appeals for the Eighth Circuit 1a

Opinion of the United States District Court for the District of Minnesota in *Mayo Foundation for Medical Education & Research v. United States* 20a

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Order of the United States Court of Appeals for the Eighth Circuit Denying Rehearing and Rehearing En Banc 66a

General Docket
Eighth Circuit Court of Appeals

Court of Appeals Docket #: 08-2193 **Docketed:** 05/28/2008
Nature of Suit: 2870 Tax Suits Regents of the U of MN v. United States **Termed:** 06/12/2009
Appeal From: U.S. District Court for the District of Minnesota - Minneapolis
Fee Status: govt

* * *

05/28/2008	Civil case docketed. [3438160] [08-2193] (JMB)

* * *

09/02/2008	BRIEF FILED - APPELLANT BRIEF filed by United States of America , w/service 08/29/2008 89 PDF pages, w/Addendum 10 copies. Words/lines/pages 13,782 words. Appellee/Responsive brief of Regents of the University of Minnesota due on 09/29/2008. , [3466884] [08-2193] (ABC)

* * *

09/26/2008	BRIEF FILED - APPELLEE BRIEF filed by Regents of the University of Minnesota, w/service 09/25/2008 66 PDF pages, w/Addendum 10 copies. Words/lines/pages13,904 words. Reply brief of United States of America due on 10/09/2008. , [3474818] [08-2193] (ABC)

* * *

10/10/2008	BRIEF FILED - APPELLANT REPLY BRIEF filed by United States of America ,. w/service 10/09/2008 43 PDF pages, NoAddendum 10 copies. Words/lines/pages6,999 words. , [3479368] [08-2193] (ABC)
10/16/2008	ARGUED & SUBMITTED in St. Paul to Judges James B. Loken, Kermit E. Bye, Lavenski R. Smith. Ms. Teresa E. McLaughlin for Appellant United States of America and Mr. Thomas Tinkham for Appellee Regents of the University of Minnesota. Rebuttal by Ms. Teresa E. McLaughlin for United States of America RECORDED [3481098] [08-2193] (CYZ)

* * *

06/12/2009	OPINION FILED - THE COURT: JAMES B. LOKEN, KERMIT E. BYE and LAVENSKI R. SMITH. James B. Loken, Authoring Judge (PUBLISHED) [3556615] [07-3242, 08-2193] (PAW)

06/12/2009	JUDGMENT FILED - The judgment of the originating court is REVERSED and REMANDED in accordance with the opinion. JAMES B. LOKEN, KERMIT E. BYE and LAVENSKI R. SMITH Hrg Oct 2008 [3556623] [07-3242, 08-2193] (PAW)

* * *

07/27/2009	PETITION for enbanc rehearing filed by Appellee Regents of the University of Minnesota in 08-2193, Appellees Mayo Clinic and Mayo Foundation for Medical Education and Research in 07-3242 w/service 07/27/2009 [3570225] [08-2193, 07-3242] (KWC)
07/27/2009	PETITION for enbanc rehearing filed by Appellees Mayo Clinic and Mayo Foundation for Medical Education and Research in 07-3242 w/service 07/27/2009 [3570268] [07-3242, 08-2193] (KWC)

* * *

08/26/2009	RESPONSE in opposition to petition for enbanc rehearing, [3570225-2] filed by Attorney Ms. Bridget M. Rowan for Appellant United States in 07-3242, Attorney Ms. Bridget M. Rowan for Appellant United States of America in 08-2193 , w/service 08/26/2009. [3580230] [07-3242, 08-2193] (BMR)

09/17/2009	JUDGE ORDER: denying [3570268-2] petition for enbanc rehearing filed by Appellees Mayo Clinic and Mayo Foundation for Medical Education and Research. in 07-3242, denying [3570225-2] petition for enbanc rehearing filed by Appellees Mayo Clinic and Mayo Foundation for Medical Education and Research. in 07-3242 Petition for panel rehearing is also denied. Hrg Oct 2008 [3586994] [07-3242, 08-2193] (PAW)
09/24/2009	MANDATE ISSUED. [3589138] [07-3242, 08-2193] (PAW)

* * *

General Docket
Eighth Circuit Court of Appeals

Court of Appeals Docket #: 07-3242 **Docketed:** 09/28/2007
Nature of Suit: 2870 Tax Suits **Termed:** 06/12/2009
Mayo Foundation, et al v. United States
Appeal From: U.S. District Court for the District of Minnesota - Minneapolis
Fee Status: govt

* * *

09/28/2007	Civil case docketed. [3438160] [08-2193] (JMB)

* * *

12/26/2007	BRIEF FILED - APPELLANT BRIEF filed by United States , w/service 12/19/2007. 86 PDF pages w/Addendum, 10 copies, 13,992 words. Appellee/Responsive brief of Mayo Clinic and Mayo Foundation for Medical Education and Research due on 01/18/2008. [3386198] [07-3242] (JPP)

* * *

02/07/2008	BRIEF FILED - APPELLEE BRIEF filed by Mayo Clinic and Mayo Foundation for Medical Education and Research, w/service02/04/2008 65 PDF pages w/Addendum, 10 copies, 13,430 words. Reply brief of United States due on 02/19/2008. [3399844-1] [07-3242] (JPP)

* * *

03/07/2008	BRIEF FILED - APPELLANT REPLY BRIEF filed by United States , w/service03/04/2008. 45PDF pages No Addendum, 10 copies, 6,989 words. [3410770-1] [07-3242] (JPP)

* * *

10/16/2008	ARGUED & SUBMITTED in St. Paul to Judges James B. Loken, Kermit E. Bye, Lavenski R. Smith. Ms. Teresa E. McLaughlin for Appellant United States and Mr. Thomas Tinkham for Appellees Mayo Clinic and Mayo Foundation for Medical Education and Research. Rebuttal by Ms. Teresa E. McLæughlin for Appellant United States RECORDED [3481088] [07-3242] (CYZ)

* * *

06/12/2009	OPINION FILED - THE COURT: JAMES B. LOKEN, KERMIT E. BYE and LAVENSKI R. SMITH. James B. Loken, Authoring Judge (PUBLISHED) [3556615] [07-3242, 08-2193] (PAW)
06/12/2009	JUDGMENT FILED - The judgment of the originating court is REVERSED and REMANDED in accordance with the opinion. JAMES B. LOKEN, KERMIT E. BYE and LAVENSKI R. SMITH Hrg Oct 2008 [3556623] [07-3242, 08-2193] (PAW)

* * *

07/27/2009	PETITION for enbanc rehearing filed by Appellee Regents of the University of Minnesota in 08-2193, Appellees Mayo Clinic and Mayo Foundation for Medical Education and Research in 07-3242 w/service 07/27/2009 [3570225] [08-2193, 07-3242] (KWC)
07/27/2009	PETITION for enbanc rehearing filed by Appellees Mayo Clinic and Mayo Foundation for Medical Education and Research in 07-3242 w/service 07/27/2009 [3570268] [07-3242, 08-2193] (KWC)

* * *

08/26/2009	RESPONSE in opposition to petition for enbanc rehearing, [3570225-2] filed by Attorney Ms. Bridget M. Rowan for Appellant United States in 07-3242, Attorney Ms. Bridget M. Rowan for Appellant United States of America in 08-2193 , w/service 08/26/2009. [3580230] [07-3242, 08-2193] (BMR)
09/17/2009	JUDGE ORDER: denying [3570268-2] petition for enbanc rehearing filed by Appellees Mayo Clinic and Mayo Foundation for Medical Education and Research. in 07-3242, denying [3570225-2] petition for enbanc rehearing filed by Appellees Mayo Clinic and Mayo Foundation for Medical Education and Research. in 07-3242 Petition for panel rehearing is also denied. Hrg Oct 2008 [3586994] [07-3242, 08-2193] (PAW)
09/24/2009	MANDATE ISSUED. [3589138] [07-3242, 08-2193] (PAW)

* * *

U.S. District Court
District of Minnesota (DMN)
CIVIL DOCKET FOR CASE #:
0:06-cv-05084-RHK-JSM

Regents of the University of Minnesota v. United States of America
Assigned to: Judge Richard H. Kyle
Referred to: Magistrate Judge Janie S. Mayerson
Case in other court: USCA 8th Circuit, 08-02193
Cause: 28:1346 Recovery of IRS Tax

Date Filed: 12/26/2006
Jury Demand: None
Nature of Suit: 870 Taxes
Jurisdiction: U.S. Government Defendant

* * *

Date Filed	#	Docket Text
12/26/2006	1	COMPLAINT against United States of America (Filing fee $ 350 receipt number 4009499.) assigned to Judge Patrick J. Schiltz per Master referred to Chief Magistrate Judge Raymond L. Erickson, filed by Regents of the University of Minnesota. (Attachments: # 1 Civil Cover Sheet)(JMH) (Entered: 12/27/2006)

* * *

03/21/2007	9	ANSWER to Complaint by United States of America.(Pahl, Michael) (Entered: 03/21/2007)

* * *

08/31/2007	21	MEMORANDUM in Support re 25 MOTION for Summary Judgment filed by Regents of the University of Minnesota. (Carlson, Kristina) Modified on 8/31/2007 (gjs). (Entered: 08/31/2007)

* * *

08/31/2007	25	MOTION for Summary Judgment by Regents of the University of Minnesota. (Carlson, Kristina) (Entered: 08/31/2007)

* * *

09/25/2007	27	MEMORANDUM in Opposition re 25 MOTION for Summary Judgment filed by United States of America. (Attachments: # 1 LR7.1 Word Count Compliance Certificate # 2 Certificate of Service)(Pahl, Michael) (Entered: 09/25/2007)

* * *

10/05/2007	32	MEMORANDUM in Support re 25 MOTION for Summary Judgment filed by Regents of the University of Minnesota. (Attachments: # 1 LR7.1 Word Count Compliance Certificate)(Carlson, Kristina) (Entered: 10/05/2007)

* * *

01/07/2008	65	AFFIDAVIT of Kristina W. Carlson in SUPPORT OF 25 MOTION for Summary Judgment *(Supplemental)* filed by Regents of the University of Minnesota. (Attachments: # 1 Placeholder for Exhibits Filed Under Seal# 2 Certificate of Service)(Bevilacqua, Theresa) SEALED DOCUMENTS RECEIVED IN CLERK'S OFFICE ON 1/7/08. (KT) (Entered: 01/07/2008)

* * *

01/23/2008	70	MEMORANDUM in Opposition re 25 MOTION for Summary Judgment *United States' Second Memorandum of Law in Opposition to the University's Summary-Judgment Motion* filed by United States of America. (Pahl, Michael) SEALED DOCUMENTS RECEIVED IN CLERK'S OFFICE ON 1/24/2008.Modified text on 1/24/2008 (jdf). (Entered: 01/23/2008)

* * *

01/23/2008	73	DECLARATION re 70 MEMORANDUM in Opposition to Motion by United States of America *Declaration of Michael R. Pahl.* (Pahl, Michael) SEALED DOCUMENTS RECEIVED IN CLERK'S OFFICE ON 1/24/2008. Modified text on 1/24/2008 (jdf). (Entered: 01/23/2008)

* * *

02/12/2008	84	REPLY re 25 MOTION for Summary Judgment filed by Regents of the University of Minnesota. (Attachments: # 1 LR7.1 Word Count Compliance Certificate, # 2 Certificate of Service)(Carlson, Kristina) (Entered: 02/12/2008)

* * *

02/27/2008	91	Minute Entry for proceedings held before Judge Richard H. Kyle: Motion Hearing held on 2/27/2008 re 25 MOTION for Summary Judgment filed by Regents of the University of Minnesota argued and taken under advisement (Court Reporter Carla Bebault) (ds) (Entered: 02/27/2008)

02/29/2008	92	MEMORANDUM in Opposition re 25 MOTION for Summary Judgment *Supplemental Memorandum* filed by United States of America. (Attachments: # 1 Certificate of Service)(Pahl, Michael) (Entered: 02/29/2008)

* * *

04/01/2008	94	ORDER GRANTING IN PART 25 Motion for Summary Judgment, Granting Count 1 of Plaintiff's Complaint, Dismissing Without Prejudice Counts 2, 3 and 4 of Plaintiff's Complaint. (Written Opinion). Signed by Judge Richard H. Kyle on 04/01/08. (rhks) (Entered: 04/01/2008)
04/02/2008	95	JUDGMENT (Attachments: # 1 Civil Notice - appeal, # 2 Civil-8th Circuit Pre-Hearing Conference Notice)(JMH) (Entered: 04/02/2008)

* * *

U.S. District Court
District of Minnesota (DMN)
CIVIL DOCKET FOR CASE #:
0:06-cv-05059-RHK-JSM

Mayo Foundation for Medical Education and Research et al v. United States of America
Assigned to: Judge Richard H. Kyle
Referred to: Magistrate Judge Janie S. Mayerson
Case in other court: USCA 8th Circuit, 07-03242
Cause: 28:7422 IRS: Refund Taxes

Date Filed: 12/22/2006
Jury Demand: None
Nature of Suit: 870 Taxes
Jurisdiction: U.S. Government Defendant

* * *

Date Filed	#	Docket Text
12/22/2006	1	COMPLAINT against United States of America (Filing fee $ 350 receipt number 4009444) Filed by Mayo Foundation for Medical Education and Research, Mayo Clinic. Assigned to Judge Richard H. Kyle per Master List and referred to Magistrate Judge Janie S. Mayeron. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Civil Cover Sheet)(akl) (Entered: 12/26/2006)

* * *

03/15/2007	9	ANSWER to Complaint by United States of America.(Pahl, Michael) (Entered: 03/15/2007)

* * *

03/23/2007	11	MOTION for Summary Judgment by Mayo Foundation for Medical Education and Research, Mayo Clinic. (Carlson, Kristina) (Entered: 03/23/2007)
03/23/2007	12	DOCUMENT FILED IN ERROR - to be refilled. NOTICE by Mayo Foundation for Medical Education and Research, Mayo Clinic re 11 MOTION for Summary Judgment (Carlson, Kristina) Modified on 3/26/2007 (gjs). (Entered: 03/23/2007)

* * *

04/02/2007	17	MEMORANDUM in Support re 11 MOTION for Summary Judgment filed by all plaintiffs. (Attachments: # 1 LR7.1 Word Count Compliance Certificate) (Carlson, Kristina) (Entered: 04/02/2007)

* * *

05/01/2007	21	MEMORANDUM in Opposition re 11 MOTION for Summary Judgment filed by United States of America. (Attachments: # 1 LR7.1 Word Count Compliance Certificate # 2 Exhibit(s) # 3 Certificate of Service)(Pahl, Michael) (Entered: 05/01/2007)

* * *

05/10/2007	24	RESPONSE in Support re 11 MOTION for Summary Judgment filed by all plaintiffs. (Attachments: # 1 LR7.1 Word Count Compliance Certificate) (Fitzgerald, Emily) (Entered: 05/10/2007)

* * *

06/08/2007	30	Minute Entry for proceedings held before Judge Richard H. Kyle : Motion Hearing held on 6/8/2007 re 11 MOTION for Summary Judgment filed by Mayo Clinic,, Mayo Foundation for Medical Education and Research, argued and taken under advisement. (Court Reporter Carla Bebault) (ds) (Entered: 06/15/2007)

* * *

08/03/2007	33	ORDER GRANTING IN PART 11 Motion for Summary Judgment DENYING Defendant's Rule 56(f) request. (Written Opinion). Signed by Judge Richard H. Kyle on 08/03/07. (rhks) (Entered: 08/03/2007)
08/03/2007	34	JUDGMENT (Attachments: # 1 Civil-8th Circuit Pre-Hearing Conference Notice # 2 Civil Notice - appeal)(VEM) (Entered: 08/03/2007)

* * *

Memorandum of Law of the United States, *Regents of Univ. of Minn. v. United States* (D. Minn. filed Sept. 25, 2007) (No. 06-cv-5084)

* * *

While *Apfel* is the law in the Eight Circuit, the factors considered in *Apfel* merely reflect a limited administrative record, and thus are just the start, not the end, of the student status analysis. Indeed while the *Apfel* factors – enrollment, tuition, registration for classes – create the *appearance* of student status, courts in tax cases must consider substance over form,[70] especially in determining whether work performed at the hospitals – up to 80 hours a week – is, or could possibly be, "incident to" study, as required under the student FICA exception.

To determine whether work in hospitals is "incident to" study, the government's counsel's declaration sets forth proposed areas of inquiry that go well beyond the *Apfel* factors—or seek factual inquiry into general issues addressed in *Apfel*—including work hour issues such as number of hours medical residents work, times residents are required to be on-call, and whether medical residents are pressured to correctly bill for patient services.[71]

As another example of proposed discovery that builds on *Apfel*, to determine whether individuals "enrolled" at the University actually "regularly attend" classes, discovery is needed to determine the

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[70] *See, e.g. Coca Cola Co. v. Commissioner*, 369 F.2d 913, 917 (8th Cir. 1966)

[71] Pahl Dec. ¶ 54.

percentage of time residents spend in didactic training as opposed to patient care; whether medical residents are allowed to skip conferences, lectures, and workshops if needed for patient care; how residents are taught; whether there are there regularly scheduled lectures and classroom time; whether residents participate in formal "teaching rounds"; whether a record is kept of the teaching rounds that have taken place; whether medical residents are evaluated by faculty members of based upon academic standards; whether there a standard program of tasks/assignments based upon increased knowledge and performance evaluations; whether a resident can be terminated from the residency program for failure to meet academic standards (which may, of course, include clinical performance); whether residents are required to take exams or prepare research projects; what percentage of the residents' time is spent in direct patient contact versus the time spent in classroom study, formal teaching rounds or other activities which may be considered the equivalent of classroom activities; what percentage of patient care time is the resident actually accompanied by the attending physician; and what percentage of patient care time is spent in patient care in which the resident's actions must be approved in advance.[72]

* * *

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[72] *Id.*

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mayo Foundation for Medical Education and Research and Mayo Clinic,	Civ. No. 06-5059 RHK-JSM
Plaintiffs,	**AFFIDAVIT OF ROGER L. NELSON**
v.	
United States of America,	
Defendant.	

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

Roger L. Nelson, being duly sworn, deposes and states as follows:

Background Information

1. From well before 1994 through 1999, I was employed by Mayo Foundation, and since 2000 I have been employed by Mayo Foundation, and since 2003 I have been employed by Mayo Clinic Rochester, as a Consultant in the Department of Internal Medicine, Division of Endocrinology.* From 1987 to

* Mayo Foundation was renamed Mayo Clinic Rochester on January 1, 2000. A new entity named Mayo Foundation was organized in 1999 and became the parent organization of the Mayo entities on January 1, 2000. *See* ¶ 12, *infra*, at pp. 5-6. (The name of the new entity was changed to Mayo Clinic on January 1, 2006, after the period at issue in this case.) Each

mid-1998 I was Associate Dean for Internal Medicine and Medical Subspecialties, and from mid-1998 to August 1, 2006 I was Dean, of Mayo School of Graduate Medical Education (f/k/a Mayo Graduate School of Medicine), a unit of Mayo * * *

* * *

The residents' purpose in participating in MGSM's residency programs was for education and not for the stipend. 282 F. Supp. 2d at 1017.

34. The patient care services provided by the residents in the MGSM residency programs were incidental to and for the purpose of pursuing a course of study in postgraduate medical education. The Residency Program Director's Handbook stated that patient care obligations should not differ significantly during the residency period compared to what would be necessary to deliver appropriate care when practicing that medical specialty. Mayo residents were working in the hospitals and clinics between fifty and eighty hours per week. Virtually all patients admitted to the Mayo hospitals were seen by residents. Large portions of the patient-care services performed by residents, however, were repeated by the supervising staff physicians who were ultimately responsible for the patients' care. The learning process on clinical rotations consisted largely of residents making suggestions to the staff physicians and the

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[Footnote continued from previous page]

reference in this Affidavit to "Mayo Foundation" is to the entity that bore that name at the applicable time.

staff physicians correcting the residents. 282 F. Supp. 2d at 1017-1018.

35. The facts related to the student status of the Mayo residents during the second calendar quarter of 2005 were identical to those described above in Paragraphs 28-34 except for the changes described below in Paragraphs 36-37.

36. There were no changes in the facts set forth in Paragraphs 28 29 and 31-34.

37. The only change in the facts set forth in Paragraph 30 was a change in the stipend levels. During the second calendar quarter of 2005, the range was from $41,057 to $55,935.

/s/
Roger L. Nelson

Subscribed and sworn to before me
this 23 day of March, 2007.

/s/
Notary Public

State of Arizona

County of Maricopa

Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

* * *

Under the affiliation agreements between taxpayer and the affiliated hospitals, the hospital assumed full responsibility for the care and welfare of its patients, and taxpayer disclaimed any such authority over patient care, as well as revenues therefrom. The hospitals agreed to provide educational experience opportunities for the residents and to provide the necessary equipment, facilities, supplies and services. The hospitals were entitled to claim the residents for purposes of obtaining educational grants from Medicare.[2] (SA. 60, 90)

* * *

Contrary to District Court's decision, the Treasury's adoption of a bright-line rule that full-time employees are no longer "students" reasonably interprets the statutory scheme. A rejection of the Treasury's interpretation thwarts FICA's purpose of requiring contributions to support coverage garnered during a worker's career. The Treasury was entitled

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[2]Medicare makes grants for Direct Medical Education (DME) and Indirect Medical Education (IME), which are generally designed to allow hospitals to recoup the direct and indirect costs of educating medical residents. DME costs include residents' salaries, while IME costs include the higher operating costs of teaching hospitals, such as the cost of any superfluous tests ordered by residents and any redundant services performed. (A. 9, Doc. 71 at 12-13.)

to decide that, rather than being "students" within the meaning of the statute, full-time workers – including medical residents – who learn by doing have entered the proverbial school of experience and should be covered by FICA.

* * *

Deposition of Hennepin County Medical Center (Dr. Michael Belzer) (Dec. 21, 2007), Ex. 1 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

* * *

[Page 6]

* * *

A: Took my first academic position at Hennepin County Medical Center in May or June of 1980, and I've been here since that time.

Q: So starting in 1980, what was the position you had?

A: I was a hematology-oncology staff physician.

Q: Did you treat cancer patients?

A: Yes.

Q: Okay.

A: And patients with blood diseases.

Q: As a staff physician, were you also a faculty physician of the University of Minnesota?

A: Yes, I was.

Q: Do you recall what you had to do to become a **[Page 7]** faculty physician at the University of Minnesota?

A: At that time or now?

Q: At that time.

A: I don't recall exactly, but I do know that it required approval of the department chair of internal

medicine at the University of Minnesota Medical School. I'm sure there was an application process and some hurdle of competency or documents that you needed to meet. I just don't recall exactly what they were.

Q: Okay, and why did you want to be a faculty physician?

A: Because I was interested in academic medicine and I valued teaching, and all faculty at Hennepin County Medical Center that treat, excuse me, that train residents and students, need to have faculty appointments by virtue of the affiliation agreement between Hennepin County Medical Center and University of Minnesota.

Q: Does Hennepin County – Hennepin County Medical Center has University of Minnesota medical residents that rotate here, correct?

A: Correct.

Q: Does Hennepin County Medical Center have its own residency program?

A: We have several of our own residency programs.

* * *

[Page 10]

* * *

Q: Does Hennepin County Medical Center make any distinction in terms of the scope of practice that you just referred **[Page 11]** to between University of Minnesota medical residents and Hennepin County medical residents?

MS. CARLSON: Objection, vague, but you can answer if you understand the question.

THE WITNESS: I think I understand the question. We don't have a separate policy for Hennepin residents, and we don't have a separate policy for University residents. They would both be expected to fall under this particular policy.

BY MR. PAHL:

Q: I'll take that back. Do the Hennepin County residents, are they enrolled in any academic institution of which you're aware?

A: Not at the present time. There was a period of time that Hennepin County residents were enrolled as students at the University of Minnesota.

Q: Do you recall when that changed?

A: Not exactly, but my guess is somewhere around 1990.

Q: Do you know why that change occurred?

A: We simply didn't have the money to pay for tuition and fees, even though we felt it was a logical, reasonable option for us. We had budgetary problems and needed to cut back on our expense structure for the residency training programs.

Q: You say you didn't have money for the tuition and fees. **[Page 12]** Do you mean to pay the tuition and fees for U of M medical residents? I'm confused what you mean.

A: No. We always paid tuition and fees for University of Minnesota residents, until probably within the past year or two. This was for our own residents.

Q: I see. So you had your own residents and you didn't want to have to pay tuition and fees for them to the University of Minnesota?

A: Correct.

Q: And that's what was stopped.

A: Correct. Purely a financial decision.

Q: After the tuition, after Hennepin County stopped paying tuition and fees for those residents, was there any change to the residency program itself.

A: No.

* * *

[Page 15]

* * *

Q: What is your present position?

A: My professional title?

Q: Yes.

A: Medical director of Hennepin County Medical Center.

Q: Are you the top medical person in this organization?

A: Let's say I'm the senior titled physician in the medical center.

Q: Okay, and who pays your salary?

A: At present, Hennepin Health – well, Hennepin County Medical Center.

Q: And you also have an affiliation with the University of Minnesota?

A: Correct.

Q: What's that?

A: Associate dean for faculty at Hennepin County Medical Center.

Q: Do you receive a salary from the U for that?

A: Yes.

Q: How much do you receive from the U?

[Page 16]

A: $10,000 a year.

Q: And roughly how much do you receive from HCMC?

A: Approximately $300,000 a year.

* * *

[Page 19]

* * *

Q: On a very, very concrete level, how is the decision made as to when the residents need to be here in the morning and how long they need to stay here before they go home?

A: Well, generally the workload and the expectation of the culture of that particular service would give them direction about when to be here.

Q: And would that be through the site director?

A: It would probably be through the individual faculty teacher who's in charge of that teaching program and that teaching service, or the residents – more likely, when I think about it, it would be, it would be up to the residents on that service to help set the culture and tone for time of arrival, and probably the time of departure within the guidelines of the work hours. So I guess as I think it through, it would be, it would be the residents in the program that they work with the senior residents.

Q: And the senior resident in turn, in trying to figure out when they need residents there and when they don't, in that sense, would turn to the faculty attending?

A: Possibly, but again, I think the workload and the training milieu and the culture of patient care would dictate more about when they would leave on a particular **[Page 20]** day than an attending. I'm not aware of any attending that would say specifically to a doctor, you need to stay here until 4:00, 5:00, 6:00, or 7:00 o'clock. I would find that very, a very unlikely occurrence. I think the workload would dictate the leaving hour and the culture of when residents start rounds to dictate the starting time.

Q: Do you mean like if a resident is on a rotation and a patient needs follow-up care, the resident is going to stay longer, without being specifically directed by the attending?

A: Correct.

* * *

[Page 24]

* * *

Q: Does Hennepin County Medical Center allow residents to moonlight? Or I shouldn't say allow. Do they hire residents to moonlight?

[Page 25]

A: Yes.

Q: Okay, and in what areas of medical practice does Hennepin County Medical Center hire medical residents to moonlight?

A: Well, we have two broad categories. One would be in our acute psychiatric services, which is our psychiatric emergency department.

Q: Okay.

A: Residents from other institutions can be and do function as moonlighters in the acute psychiatric services. In that case, they are, they need to be licensed, have malpractice insurance, and join the medical staff, because they're independent practitioners. So they're not functioning as residents.

Q: Okay.

* * *

[Page 28]

* * *

Q: And also, you just mentioned the word clinic, are the residents, U of M residents who come to HCMC, do they perform services not only in the hospital, physically where we are here today, but do you also have clinics that they go in?

A: Well, they train in clinics, because an important part of their education and training experience is outpatient medicine. I wouldn't categorize it as providing services, because our faculty could easily provide the services in a more efficient and quicker fashion if they didn't have residents, but we need to train them in the complete spectrum of educational opportunities, so they are training in our outpatient clinics.

* * *

[Page 32]

* * *

Q: Now, we've talked about attending physicians. Do they all have to be credentialed by HCMC?

A: Oh, most definitely.

Q: Tell me the process by which a physician becomes credentialed.

A: Well, it's very structured and very detail-oriented and very fastidious, where we need to – are you asking me to explain the concept of credentialing or what generally happens of someone applies for it?

Q: The latter question, yes.

A: If someone applies to be a faculty – well, first of all, they need to be offered a position by someone in, well, **[Page 33]** if we're talking about Hennepin Faculty Associate doctors or – if we're talking about Hennepin Faculty Associate doctors, I can give you one answer. But the idea of credentialing is they need to apply for membership in a department, and to do so, they need to – and for privileges, special privileges. So the privileges for an internal medicine doctor would be different for a neurosurgeon. They then need to provide evidence of their medical school training, their residency training, their license, malpractice insurance, immigration status, background check, and a whole list of things that I'm sure I've forgotten some things, that then gets approved and signed off and, not authenticated, but approved by a department chair.

The credentialing office at Hennepin County Medical Center then has a number of things they must primarily source verify—medical school, undergraduate training, residency training, subspecialty training, and any other hospitals that they've practiced at- to be sure that we aren't just operating

on the applicant's word or on potentially false documents. Primary source verification means you go to the primary source.

Once the application is complete, signed off by a department chief, it goes to a credentials committee. The portfolio of documents that have been **[Page 34]** presented, primary source verification, their credentials, the signing off by the department chief, and the proof that they're requesting, go to a credentials committee and either passes or is deemed incomplete or other questions are asked.

Assuming it is a clean application and receives approval and the credentials committee approves it, it then goes to the medical executive committee.

The medical executive committee then receives the credentials committee report, asks any questions. If everything seems to be fine, they would approve it.

And then after that third step of approval, it needs to go to the governing body of the hospital, in our case it's our Hennepin Health System board of directors.

Once it's gone through the department chair, the credentials committee, the medical executive committee, and the board, the individual then receives their credentials, have their privileges approved, and then are on probationary status for a year.

Q: And so that entire process is controlled by the hospital?

A: It's a hospital function and is under my office, correct, as it would be in any hospital anywhere.

Q: And if an attending physician did something that violated **[Page 35]** the hospital bylaws, it could result in the hospital taking away the credentials as well?

A: Sure, it could. It could result in someone not being approved for medical staff membership, if their past record was erroneous or biased.

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[Page 39]

* * *

A: Mind you, they've already been seen by a staff member, okay, and the determination was to be admitted. So if you were admitting in a private hospital without a teaching program, you would get admitted by an emergency department attending physician; and chances are, depending on when you came in, you might not be seen for that period of time either.

Q: So in terms of this 18 hours for the attending, before the end of the 18 hours, the new admitted patient, could they be seen by a medical student?

A: They are typically seen – they could be, yeah, but they're seen by a team, which would probably typically **[Page 40]** consist of a medical student and a resident.

Q: And the medical student and the resident could do a history and physical?

A: They would be expected to do that.

Q: If the person had come in with shortness of breath, the resident could order tests done to see whether the person had pneumonia, for example?

A: Yes.

Q: The resident could write a prescription if medically necessary?

A: They'd write orders.

Q: Orders, and orders would include prescriptions?

A: Yeah, but our expectation is that patients are staffed by the attending physician by phone or some communication. What we're outlining here is personal face-to-face observation and examination. But it would be the expectation that that individual who's being admitted to a team of residents and students gets discussed with the attending and the care plan worked out with the attending.

But if your question is could a resident order an x-ray or make a laboratory test order, yes, that's how they learn. You wouldn't want to have a circumstance of physician training with an attending at all times looking over the shoulder or telling a trainee **[Page 41]** what to do, because that would not be a good learning environment.

Q: And –

A: So I wouldn't say they're directing the care. They're, in a learning sense, making decisions and venting it with senior residents and faculty about how to care for a patient; and if the individual is critically ill, then they need to be seen by a faculty face-to-face sooner than that.

* * *

[Page 45]

* * *

Q: It says the attending must "be available at all times by **[Page 46]** telephone or pager." Do you see that?

A: Correct.

Q: It says here that they must "directly assist in patient care activities when requested by the resident." Do you see that?

A: Yes. That's a good thing.

Q: So, I mean, is the resident then making the decision whether or not they need the help, rather than the attending deciding that the resident needs the help?

A: Well, that's an interesting question. Considering that the idea here was that if a resident feels they're over their head, they don't know what's going on, they need some senior input sooner, as opposed to later, we expect our medical staff to be available to assist the resident.

Q: Okay, so I mean, just to take an example, if you had a resident in the middle of the night who looked at a patient and believed that they may have meningitis and believe that a lumbar procedure should be done. Am I getting the medical stuff correct?

A: Uh-huh.

Q: And this resident, a resident could in that circumstance go ahead and –

A: Yes.

Q: – do a lumbar procedure, correct?

A: Correct.

[Page 47]

Q: And then another resident in the same situation could call up an attending and ask them to come in the hospital to do it?

A: That would be unusual, but yes, they could.

Q: They could.

A: They could.

Q: What would more usually happen if you had a resident who was uncomfortable, knew a lumbar procedure should be done, but was uncomfortable doing it themselves, what would they, and it's 4:00 o'clock in the morning, what would typically happen?

A: They'd probably contact a more senior resident on their service, who's covering their service, and talk it over with a more senior resident, who would probably have adequate skills to make that determination. Since lumbar punctures – you picked one of the, one of the procedures that we would allow residents to do without faculty supervision at the time the procedure was done.

* * *

Government Exhibit 162, Attachment to Deposition of Hennepin County Medical Center (Dr. Michael Belzer) (Dec. 21, 2007), Ex. 1 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

HENNEPIN COUNTY MEDICAL CENTER

Section Medical Staff
Policy #120050
Author Bylaws Review/Revisions Committee
Release Date 04/06/05
Replaces 09/11/02
Approved by MEC & EC

Subject: Resident and Fellow Scope of Practice

PURPOSE

To assure that Hennepin County Medical Center residents perform appropriate duties which meet requirements for the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) and the Accreditation Council for Graduate Medical Education (ACOME) and individual Residency Review Committees for specific residency programs.

POLICY

Hennepin County Medical Center shall train resident physicians in the art and science of practicing compassionate and competent care for the population of the state. Special emphasis shall be placed on training resident physicians in the special areas of

excellence of HCMC with consideration to the needs of the society and the community that HCMC serves.

Except in an emergency, residents' service responsibilities shall be limited to patients for whom the teaching service has diagnostic and therapeutic responsibility. Any resident or fellow shall limit their scope of practice to coincide with privileges held by (a) member(s) of the HCMC medical staff who is (are) responsible for their supervision.

DEFINITIONS

Fellow: A fellow is a resident in a subspecialty-training program and is considered a resident in every way. A fellow is often the senior resident on a given service.

Senior Resident: The resident on each service who has the most training and is given the most responsibility by the medical staff.

Junior Resident: A resident who had more than one year of residency training but is under the supervision of a member of the medical staff and a senior resident.

GI Resident: A resident in the first year of residency training.

PROCEDURE

General Responsibilities of the Senior Resident on each service:

Under the direction of the medical staff, the Senior Resident on each service shall:

- provide overall supervision of the resident physicians and medical students assigned to the service.
- provide direct patient care as outlined for junior and G-I residents.

- act as the liaison with Administration and Nursing Administrative Services.
- shall be responsible for such administrative and teaching duties as assigned by the program director or his/her designee.
- plans and participates in conferences and other teaching activities.
- implement and enforce hospital policies including duty hour requirements for junior residents.
- contact the faculty when there are questions about patient care.

The program director or his/her designee shall assign the Senior Resident to more specific duties relating to management of the service. All residents shall abide by individual regulations of the specific service to which they are assigned. While on ward services, they are responsible for the care of patients assigned to them, and they shall participate in departmental conferences.

General Responsibilities of Junior (G-2 and above) Residents

Under the supervision of the senior resident and medical staff, the junior resident will perform all of the responsibilities of the G-1 residents and also supervise the G-1 residents and students as assigned by the medical staff.

General Responsibilities of Graduate Level 1 (G-1) Resident Physician:

Under the supervision of the senior resident and medical staff, the G-1 resident shall:

- have direct responsibility for care of patients.
- perform such tasks assigned to them by the senior resident and the medical staff

- abide by the schedule of the particular service through which they are rotating.
- obtain time-off approval from their supervising resident.
- be responsible for the work-up, care and clinical records of their assigned patients.
- perform and record a complete history and physical examination.
- write orders for patients including ordering of diagnostic testing and medications.
- be responsible for completion of the patient's medical record.
- attend assigned clinics.
- make rounds as scheduled with their supervising resident and medical staff. Absence from rounds shall be allowed only in the case of personal illness or with specific permission from their senior resident. Prior to making rounds, the G-1 shall assure that all significant data is available, including laboratory and x-ray reports, etc.
- be knowledgeable of all significant information related to their patients.
- contact the senior residents and medical staff any time when questions arise pertaining to Patient care.
- participate in didactic sessions.
- evaluate the rotation, program and medical staff as requested.

Performance of Procedures

Resident physicians, including GI residents, may perform the following procedures independently with a supervisor available to be called:

Sterile technique (e.g. gloving, sterile dressing change)

Application of Universal Precautions

Basic venipuncture
Venipuncture to obtain blood cultures
Insertion of an intravenous cannula
Obtaining an arterial puncture

Injection of a local anesthetic block
Interrupted suture closure of a simple skin laceration
Subcutaneous suture closure of a wound
Basic wound care
Basic burn care

Obtaining a throat swab
Stool occult blood (Hemoccult) testing
Urinalysis by dipstick

Removal of cerumen from external ear canal
Placement of Foley catheter, male
Placement of Foley catheter, female
Performance of routine STD testing, male and female
Performance of a speculum exam
Performance of a PAP smear
Microscopy for "fern" of amniotic fluid
Microscopy of vaginal smear "wet prep" and KOH exam

Basic Life Support (cardiopulmonary resuscitation)
Positive pressure ventilation
Use an automated external defibrillator (AED)

Temporary immobilization of a cervical spine fracture
Control of gross external hemorrhage and stabilization of bleeding patient
Management of a simple nose-bleed
Application of a temporary splint or simple cast

Performance of injections (i.e. as intradermal, subcutaneous, intramuscular and intravenous) Lumbar puncture
Fluorescein staining and examination of the eye

Insertion of a nasogastric tube
Incision and drainage of a superficial abscess

Evaluation of patients for restraints and sedation

Resident physicians may perform additional procedures with direct supervision by medical staff or a more experienced resident who is determined by the program to be competent to perform the procedure.

Relationship to Medical Students:
HCMC plays an important role in the clinical teaching program of the University of Minnesota Medical School. Medical students are assigned to most services, and the medical staff or senior resident of those services defines their responsibilities. A medical student's duties include:

- histories and physical examinations; and
- writing orders (all orders must be countersigned).

Those duties may also include:

- drawing blood and taking urines;
- administering intravenous medications (under direct supervision of housestaff); and
- starting intravenous infusions without added medications.

The degree of responsibility to be assumed by medical students in assisting with care of patients is determined on an individual basis by the medical staff of the department involved.

Resident Evaluation:
Resident evaluation is the responsibility of the program director or his/her designee. A resident is evaluated at the end of each resident rotation by the medical staff and this is sent to the program director or his/her designee. In addition, other feedback to the program director or his/her designee may include

the results of standardized tests, patient simulations, input from patients and other hospital staff. The program director or his/her designee must meet with each resident at least twice a year and, based on the resident's progress, may promote the resident to the next year of training. Residents may also be placed on suspension, probation or dismissed based on the judgement of the program director or his/her designee. Residents have access to an appeal mechanism and due process in accord with their contract

Participation on Hospital/Medical Staff Committees:

The hospital encourages and expects resident physicians to learn about and become active in hospital policy-making. Therefore, residents are encouraged to become resident members of medical staff and hospital committees. If a resident is interested in participating on a committee:

- they may contact the Associate Medical Director for Medical Education in the Office of the Medical Director, 347-3418.
- their residency program director or his/her designee shall write a letter to the HCMC Medical Director stating the program's support and willingness to free up the resident's time to attend committee meetings.

The HCMC Medical Director shall make all appointments to medical staff committees.

Deposition of Allina (Dr. Terrill Rosborough) (Dec. 12, 2007), Ex. 2 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

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[Page 12]

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Q: Do you see the first sentence there, it says, "Affiliate staff members with the University of Minnesota faculty appointments . . . have responsibility for teaching, supervising and evaluating the performance of residents/fellows/students assigned to the Affiliate?"

A: Yes.

Q: Tell me what that means.

A: Each educational program that has faculty members obviously sets out expectations in terms of what's being taught, how it's being taught, and how the evaluations are going to proceed, and this is saying that for University programs that have rotations here, that the people here serving as faculty are responsible for the teaching, supervising, and evaluating the performance.

Q: Okay, and in what ways do these faculty members teach the residents?

A: Either through participating in the patient care or through more formal educational activities in a conference room or sitting down having a discussion.

Q: Do residents regularly attend classes at Abbott Northwestern?

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A: We wouldn't call them classes. We would call them conferences. But in the great majority of the interchanges that we would have with the University in those residencies and fellowships, there would be conferences that they would attend.

Q: Okay, and is there a required attendance?

A: In many circumstances, there would be required attendance. Some conferences are more open and it would be more optional.

Q: Is it permissible for the resident to not attend a conference if they have to deal with a patient?

A: Yes.

Q: And when you talk about conferences, with specific conferences are you referring to?

A: I'm not sure I understand what that question would mean.

Q: Okay. Well, you used the word conferences.

A: Right.

Q: And I'm wondering what you mean by conferences.

A: Conferences are clinical conferences, where almost always a patient or patient problem is being presented, discussed, or medical topic is being presented and discussed.

Q: Who would attend that conference?

A: It would almost always be both residents, as well as faculty members.

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Q: Are there any other conferences that you're referring to?

A: No. They would all be of that same type.

Q: Okay, and in terms of those –

A: Some conferences would be predominantly for the residents or fellows, and some would be conferences that are also for attending staff members that they might attend.

Q: I see. What would be the distinction between those two conferences?

A: Probably would get to the question of required, things that were specifically designed for the residents or fellows would usually fall under the category of required.

Q: Does Abbott Northwestern have a title for these conferences?

A: Most of them within their little spheres of activity would have a title that was created by that department, and like we could call something medical grand rounds, somebody else might call it the Monday cardiology conference. The title they pick out for themselves, not chosen by Abbott Northwestern.

Q: And in a typical week, how many conferences like you just mentioned would you have?

A: It varies quite a bit with the residency and the fellowship. There wouldn't be a modal number.

Q: What's a modal number?

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A: It's a term for the midpoint. It's different from median and mean. It would be the most common.

Q: The mode. Okay, I've got it.

A: Yeah.

Q: So what could be the range then in a typical week?

A: One to five or six.

Q: And these conferences, what would be the range of how long they take?

A: They would most typically be 30 to 60 minutes.

Q: In any of these conferences, does a conference consist of a senior resident teaching to a junior resident?

A: Obviously generically, yes. I'm thinking of the specific University residencies and fellowships that were existing at that time, and in most of those, we're talking about small numbers, where there is only one or two people here at most, and so you don't really have that opportunity going on as much.

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Q: Can a medical student introduce themselves to a patient as a doctor?

A: No.

Q: When a resident signs a note, have you seen what the resident puts down?

A: Yes.

Q: Does the resident attach any title?

A: Yes.

Q: What would that be?

A: M.D. or D.O.

Q: And what is a D.O.?

A: Doctor of osteopathy.

Q: And what is that?

A: It's a physician who's graduated from an osteopathic school of medicine.

Q: And are residents allowed to refer to themselves as doctor in dealing with patients?

A: Yes.

Q: Do they in fact do so?

A: Yes.

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Q: Okay. Going down here, however, do you see where it says "Didactic/Classroom (non-patient care) FTEs?"

A: Uh-huh.

Q: Do you know what that is?

A: Yeah. We are required, for the count that determines the government reimbursement, to split off classroom activity, things where the residents are not involved in patient care, for the purposes of deciding what the IME, or the indirect medical education reimbursement is going to be from the government. That is – do you know what that is?

Q: I know what DME and IME is, but I don't know what you're talking about here, the breaking off of the classroom portion.

A: Well, IME gives you a payment that in its original form was intended to compensate you for inefficiencies of patient care brought about by having residents and fellows around. So that payment is strictly related to patient care activities that they would be involved with, and so the government formula is not going to pay you money for time when the residents and fellows are not taking care of patients, and so this is splitting off that portion where the residents or fellows would not be **[Page 52]** involved in patient care.

Q: Okay, so –

A: For the IME calculation.

Q: So what is the portion then that is in there?

A: It's a total here of 3.801 FTEs are considered noneligible, and the other 26.7 are eligible for IME.

Q: So the eligible is the patient care portion?

A: Right.

Q: Noneligible is the classroom portion.

A: Correct.

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A: It's obvious that a hospital has guidelines for patient care that are related to quality and safety, that have to do with privileging, that have to do with certain kinds of activities, documentation that must be fulfilled, has monitoring committees and quality and safety. Every physician, no matter who they are, has to operate within those guidelines.

Q: When you say every physician, do you include residents?

A: I include residents and fellows.

Q: Okay.

A: As long as somebody is operating within those guidelines and monitoring and the privileging, physicians are independent to practice the medicine on a patient that they think is best at that time. That generality would apply to residents and fellows and their interaction with **[Page 54]** the attending physician as well, in that they would be, on a day-to-day, hour-to-hour basis, they would be providing patient care under the supervision of that particular attending under that set of guidelines.

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Q: Okay. Will you hand it back to me? Thank you. It says, "Interns, residents and medical students in training in the hospital shall be supervised at all times in their day-to-day patient care activities by the program director, clinical faculty and/or the attending Medical Staff appointees." Okay? What does that mean, that they're supervised by program director, clinical faculty, and/or the attending medical staff appointees?

A: It's making a distinction between people who have full faculty appointments and would be considered the clinical faculty, and other medical staff members who are involved more casually with supervising residents, fellows, or medical students in patient care, but whose volume of work in that area

is not sufficient to grant them a faculty appointment at the University.

Q: What do you mean by more casually, those types of physicians?

A: Within departments at the University, faculty appointments have to meet certain thresholds of involvement, and there may be a physician who has a **[Page 59]** patient in the hospital and a resident, fellow, or medical student may be helping to take care of that patient with them, they're supervising, then they're off and doing work on their own. That is a level of involvement which is too low to grant them a faculty appointment, and yet, they are periodically interacting and supervising the care of patients with those trainees.

Q: So the residents are supervised at the time by nonfaculty members.

A: Correct.

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Q: In terms of the supervision of residents, is it also correct that – well, do senior residents supervise junior residents?

A: Yes.

Q: How so?

A: It seems like a simple question, but I'm not – I don't exactly know what you mean by how so. Do you mean under what authority or what do they practically do?

Q: Right. Give me a practical example of how a senior resident is supervising a junior resident.

A: Residency and fellowship, residency requirements in particular, require graded responsibility as you move through years. So when you are a first-year resident, you are really not supposed to do much of anything all on your own. Somebody always needs to be watching you who is more experienced. They way things are set up is the next person up the totem pole is entitled to carefully work with and supervise the person down below them, but their work is still always under the full supervision of **[Page 64]** the attending physician at the time. So it's more a matter of residents work in teams with an attending physician than anything else.

Q: And when you talk about the supervision of the attending, the attending doesn't have to be physically present when a resident –

A: They must be physically present for certain kinds of activities.

Q: Is that in part because that's a Medicare requirement?

A: For sure.

Q: For example, in surgery?

A: Yes.

Q: The critical part of the surgical procedure must be done by the attending in order to bill.

A: Correct.

Q: Everything prior to that point could be done by a resident?

A: Correct.

Q: Everything after that point could be done by a resident.

A: Correct.

Q: So when we use the word supervision, we're not talking literally an attending looking over a resident's shoulder at all times.

A: Correct.

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Q: What would happen is a resident – could a resident go to an attending and say I don't want to do a paracentesis, I've already done enough of them, I don't really want to learn anything more, you do it yourself?

MS. CARLSON: Objection, incomplete hypothetical.

THE WITNESS: If what's being asked of a resident is within the general and specific expectations of the experience, the resident doesn't have an ability to not do it.

MR. PAHL: Thank you.

THE WITNESS: Easier, in my – to say, you know I've worked up enough patients, I just don't think I'll do one more, but we're not over any sort of limits that are set, we don't have the ability. That would **[Page 78]** result in major disciplinary action against the resident.

* * *

Deposition of HealthPartners (Dr. Carl Patow) (Dec. 21, 2007), Ex. 3 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

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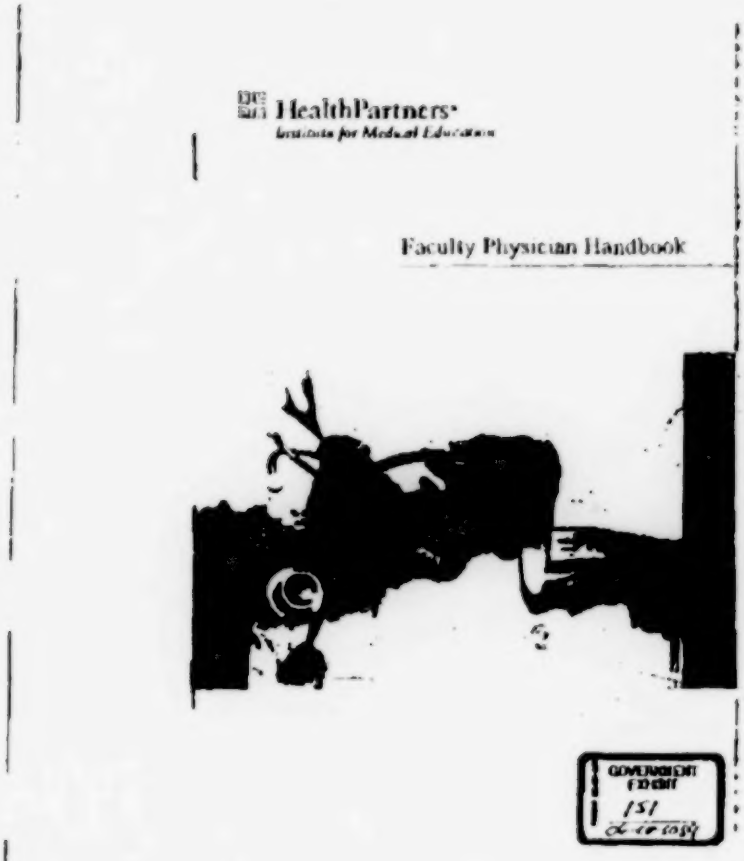
Q: * * * This also, third paragraph in this page, paragraph, sorry, page 6 of Government Exhibit 151, states that, it's the third paragraph there, "The institution and program directors have an obligation to minimize resident physician activities that are clerical, repetitive or professionally inappropriate." Do you have any examples of what Regions has done to avoid having residents engage in those activities?

A: We see residents as first being a resident at Regions for education, and secondly for clinical responsibilities; **[Page 58]** and where there are clerical or professionally-inappropriate activities that don't contribute to their education, we try to eliminate those.

So, for example, rather than have residents involved in drawing blood samples for the laboratory, we have teams of people that draw those blood samples. You know, rather than have residents involved in finding charts, we have people who are responsible for making sure the chart's available, or now it's electronic. So this is meant to enhance their educational time.

* * *

Government Exhibit 151, Attachment to Deposition of HealthPartners (Dr. Carl Patow) (Dec. 21, 2007), Ex. 3 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)



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Faculty Physician Handbook

Excellence in Clinical Education

Regions Hospital is known in our community as both a place of outstanding care and as a leader in medical education. For over 100 years resident physicians have been taught here by an outstanding, dedicated full time clinical faculty. Today, over 165 resident physicians are at Regions Hospital and the HealthPartners medical Group Clinics at any one time, learning advanced medicine and providing state-of-the-art care. Resident physicians are essential to patient care on many hospital and clinic services, including the Level 1 trauma center, medical and surgical inpatient units, specialty care, family and community medicine, anesthesia, radiology, emergency medicine, and obstetrics and gynecology. The large volume and diversity of patients provide residents and fellows with extensive hands-on experience needed to become outstanding clinicians. Educational experiences at Regions Hospital are highly rated and are much sought after. The Hospital is affiliated with the University of Minnesota, and sponsors its own programs through the HealthPartners Institute for Medical Education.

As an important part of patient care, resident physicians help to define the character of the institution and are entrusted with considerable responsibility for providing quality care as well as learning their art. This handbook was developed to provide guidance to resident and faculty physicians regarding their roles and responsibilities, particularly with regard to patients' trust in our Medical education program. To some readers the principles in the handbook may seem obvious. To others, the principles will be new and thought provoking. The general

principles in the handbook will require judgment when applied to individual teaching programs and clinical services. HealthPartners is committed at all times to providing care that is safe, timely, effective, efficient, equitable and patient centered. This handbook is dedicated to integrating these six aims into the clinical care and educational opportunities provided at HealthPartners and Regions Hospital.

Patient-centered Care in Medical Education: A Faculty and Resident Physician Handbook

HealthPartners is committed to providing care that is safe, timely, effective, efficient, equitable and patient-centered. This commitment extends to every member of the care team, including attending physicians. resident physicians, nurses and allied health professionals. As an organization that engages in medical education, our responsibility is to simultaneously provide high-quality education with outstanding care.

This handbook provides guidance to attending physicians and resident physicians regarding roles and responsibilities related to patient-centered care, primarily in in-patient settings. The principles in this handbook may not fit every situation that arises, but are intended to provide a framework for interactions and decision-making. The underlying principle is that care should be patient-centered.

Appearance

All physicians are expected to behave in a professional manner while in hospitals and clinics.

A well-groomed and neat personal appearance and professional dress are important in establishing respectful, professional relationships with patients.

A white lab coat, without a logo or with a Regions Hospital or HealthPartners logo, should be worn where appropriate. White coats with logos of other organizations are not to be worn.

Patient participation in medical education

All physicians will clearly identify themselves and describe their roles to patients and families.

Patients will be provided in the hospital admission packets with information about participation in the education process, so that they may make an informed choice to participate or not participate in medical education.

Except in emergency situations and critical care units, resident physicians participate in care to the extent that the patient agrees to their participation. Participation is subject to the appropriate supervision of the attending physician. Patients may agree to have residents involved in some aspects of their care, but not others. The patient need not agree in writing to have, or not have, residents involved in their care.

In circumstances where the patient requests not to participate in medical education the attending physician of record is responsible to care for the patient or to arrange for appropriate transfer of care to amending physician.

Supervision

Attending physicians are responsible for ensuring safe and effective patient care. An important part of safe care in medical education is adequate supervision of resident physicians by attending physicians.

The attending physician is responsible for care of the patient, however the attending physician may request resident physicians to provide and coordinate care under supervision.

In accordance with Medicare rules, attending physicians determine the levels of supervision resident physicians need to provide safe and effective care. They must communicate the plan for supervision to the resident. Expectations for resident supervision may be articulated in a resident information packet. Residents are responsible for reading this information and discussing supervision issues and learning expectations with the attending physician.

Decisions about admitting patients for care involving resident physicians should be based on the opportunity for the resident physician to learn and the attending physician to teach about the patient's condition and its management.

Attending physicians should clearly articulate to resident physicians their expectations for the resident's decision-making authority in patient care. Unless an attending physician indicates otherwise, resident physicians are expected to confer with the attending physician at the time of admission, before every procedure, and when considering significant changes in diagnostic or therapeutic strategies.

Residents should communicate with attending physicians at any time they feel uncertain about their abilities, the patient's condition, or the plan of care.

When approving a resident physician's request to perform a procedure, the attending physician must ensure that the indications and procedure are appropriate, the resident physician has the knowledge and skills to perform the procedure, the appropriate level of supervision is provided and the patient has agreed with resident participation and provided informed consent.

Transfers from one hospital to another are subject to federal EMTALA (Emergency Medical Treatment and Active Labor Act) law. Patients who are transferred from Regions Hospital must consent to the transfer. The transferring physician must speak with the accepting emergency room or staff physician at the receiving hospital, and the patient must be transferred using an appropriate mode of transportation.

Respect

Attending physicians and resident physicians are expected to treat patients, families, visitors, and each other with respect.

The attending physician must be familiar with the ACGME (Accreditation Council for Graduate Medical Education) work-and-duty-hours regulations and how these regulations apply to the resident physicians under their supervision. The attending physician who is supervising clinical service must ensure the resident physician's adherence to these regulations. Attending physicians must also monitor resident physicians for signs of fatigue and take appropriate action, when necessary, to protect the safety of patients.

Resident physicians must be familiar with and comply with the ACGME work-and-duty-hours regula-

tions. It is the responsibility of the resident physician to report their personal violations and to identify potential and avoidable violations of these regulations to his/her residency director.

The institution and program directors have an obligation to minimize resident physician activities that are clerical, repetitive or professionally inappropriate, or that do not contribute to advancing the resident's knowledge at an appropriate level of medical education. It is the responsibility of the hospital to provide personnel services for routine non-physician patient care. Resident physicians should not compensate for operational systems inadequacies that may exist.

Patient-centered care

Patients have a right to confidentiality. All physicians must ensure that sensitive patient information is not discussed in public places. No patient information is to be shared with others who are not participating in the patient's care, except when the patient provides written permission in advance, as required by the Health Insurance Portability and Accountability Act Of 1986 (HIPAA) and its regulations.

Communication is central to determining the diagnosis and defining the best treatment in the patient's social context. Communication may include the patient, family members, other caregivers, and the referring provider. The patient must give permission for sharing their healthcare information with others, as required by applicable state law.

Time is a precious commodity to patients. All physicians should make every effort to provide timely and convenient care for patients. The care team should

work to minimize redundancies, delays and inconveniences.

Patients and families with health care concerns may feel particularly vulnerable. Thoughtless comments by caregivers may be perceived as degrading or pejorative, undermining the patient's confidence in the institution and the quality of care. Cultural sensitivity and knowledge of cultural differences are essential to good patient communication and care.

Continuity is important to the patient experience. Resident physicians with obligations to continuity clinics must attend these clinics as required by Residency Review Committee rules, under the direction of the Program Director. Attending physicians on inpatient services must respect existing continuity clinic obligations

At times, providing patients with a high-quality, satisfying health Care experience requires special effort. One example is the patient's preference for communication, such as with a professional interpreter, with written translated health materials, or oral education only (for patients with limited literacy). Family members should not be used for medical interpretation unless an emergency arises, or unless the patient has a strong desire to use family members. The physician may need to pre-schedule or page hospital interpretive staff, or use telephone interpretive services.

Safety

Every effort should be made by resident and attending physicians to improve patient safety. All caregivers should report any safety concerns, and should take immediate action if an unsafe condition threatens patient or staff well-being.

A legibly printed signature block, or signature stamp imprint, must accompany all entries in the medical record by any individual. There should never be a question about who has made an entry into a medical record. All entries in the medical record must be legible.

All physicians should take advantage of opportunities to participate on teams, committees, and other means to promote patient safety, quality improvement and efficiency of care,

Every institution can be improved. Attending physicians should facilitate making improvements in care, and resident physicians should be encouraged to recognize opportunities for improvement and to participate in processes that will improve the quality of care and the care environment. If improvement opportunities are identified, action should be taken through appropriate reporting channels.

Summary

All physicians should be positive and proactive in providing care that is safe, timely, effective, efficient, equitable and patient-centered. Physicians can contribute to a climate of professional excellence by recognizing teams and individuals who contribute to great care. Resident physicians provide considerable knowledge, skills, compassion and energy to patient care. Attending physicians provide their time, expertise and dedication to teaching the next generation of physicians. All physicians contribute to excellent care and patient safety by providing care that is, at its heart, patient centered.

Deposition of Fairview (Dr. Gordon Alexander) (Dec. 11, 2007), Ex. 4 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

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Q: Okay. What does the attending have to do?

A: In order to bill for Medicare, the attending as to be able to demonstrate that there was supervision and it has to be direct enough that the attending needs to be at least in the vicinity, if not in the room. So it has to be a direct level of supervision.

Q: How about a lumbar puncture, for example, can you tell us what that is?

A: Most people refer to it as a spinal tap.

Q: Okay, and first time a resident performs that, would they typically do that with other persons present?

A: If it's first time, I hope somebody else is present.

Q: Okay, and who would typically be there the first time a procedure like that would take place?

A: It could be a senior resident, it could be a faculty.

Q: Does there come a point in a residency where the resident can perform the lumbar puncture procedure by themselves without a senior resident or attending?

A: It may well.

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Q: When a resident's on call at night, is an attending typically in the hospital with the resident?

A: It depends upon the program. Typically, no, but there certainly are some programs where faculty may be in the hospital.

Q: Which programs is it more likely that the faculty will be in the hospital?

A: Help me. Is this the middle of the night, you're talking about 2:00, 3:00 a.m. in the morning?

Q: Yeah, yeah.

A: You know, the only one that's pretty reliably there would be emergency medicine. Some of the critical care services, intensivists, faculty may be present, but don't need to be.

Q: So when a resident is in the hospital at say 3:00 a.m. and there is no attending, who directs what the resident does with the patient?

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A: Residents are always under the direction of faculty, meaning the attending physician on the given service or the person on call for that service. So they're always under the direction of faculty, even if it's indirectly from home.

Q: If the resident's on call at night, can the resident prescribe a medication for a patient?

A: Yes.

Q: Can they do that without contacting the attending?

A: It would depend upon the medication. In many cases, yes, they would have sufficient training and experience to be able to do that safely.

Q: Can the resident in the middle of the night write orders for a patient without contacting the attending?

A: In many cases, yes.

Q: Can you give an example of what an order might be?

A: Could be for a laboratory test, it could be for a medication, it could be a care order such as for – it could be a diet, it could be a restraint order.

Q: When the residents write those orders, do they use the phrase M.D., do you know?

A: Yes, residents are M.D.s.

Q: Do they refer to themselves as doctors when they deal with their patients?

A: Residents are doctors.

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Q: When a resident is in the hospital during the day, is it correct that the resident will see patients without an attending physically present?

A: Sure.

Q: A resident may talk to a patient about a treatment plan without an attending present?

A: They do at times. They also do it with their attending present.

Q: During the day, a resident could write a prescription for a patient without consulting with the attending? That could happen?

A: It could.

Q: During the day, a resident could write various orders without consulting with an attending. Is that correct?

A: That's correct.

Q: And when we're talking about attendings at Fairview, do the attendings work say ten, 12 hours a day in a hospital ward?

A: It would depend upon the service, the specialty, lots of circumstances.

Q: Is it possible you could have an attending who was only at the hospital for two to three hours a day?

A: It's possible.

* * *

Deposition of Park Nicollet (Dr. M. Mark Melin) (Dec. 12, 2007), Ex. 5 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

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A: * * *

Let me put it this way: As a staff surgeon, if you talk to any staff surgeon at this site, residents are students. They're students learning an art, they're **[Page 54]** students learning some wisdom, they're students learning techniques, and that's why they're here, because we're simply educating them. And so none of us would lay on a table and let even the best residents, even the ones we've hired, because on this list, Paul Vietzen, we hired him, I can tell you right now, when he was a fourth-year resident, as much as I liked him, as good as he was, I wouldn't have laid on the table and let him do a hernia on me. I don't know that I'd let him pop a zit on me. Because he's a student.

Now, once he passes his chief residency, once he passes his boards, written and oral, he's no longer considered a student. Now he's a colleague.

So that's where we're at with all these people that rotate here. I mean, they're great people, they're hard workers, they're smart, they're highly educated, they're highly motivated, because they all want to get to the point where, you know, where we are.

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Q: You used the word CME before?

A: CME. Continuing medical education, yes.

Q: And I believe you used that in reference to some of the conferences. Is that correct?

A: Yes.

Q: And so when you go to these conferences for CME. Is that correct? And you –

A: That's a component of it.

Q: I mean, can you use these conferences yourself for your continuing medical education requirements?

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A: Yes

Q: And these are the same conferences that are attended by the residents?

A: Correct.

Q: Do the residents regularly attend classes at Park Nicollet?

A: How do you define classes?

Q: Well, do they or do they not? I mean, do you know, do you have some –

A: To me, a conference room is a classroom, because we're still educating.

Q: Okay, and so in a typical day, how much time would a resident spend in a conference like that?

A: On Tuesdays, when they're University, it's typically three hours; on Wednesday, it's an hour; on every other Thursday, I believe it's an hour; and then on every Friday, it's an hour. And then there is the so-called scrub skink classroom, where as we're scrubbing our hands, we'll spend five minutes discussing, you know, it and talking about the nuances about the case, what did you read about, describe this technique, tell me what the options are.

So there is a lot of that kind of classes going on. Classes without walls are going on during the entire day as we discuss patient management. So, you [Page 59] know, there is that time, but also there is, you know, there is going to be another hour or two added in every day in terms of staff conversations with residents regarding all sorts of other issues.

Q: Is there any average for the amount of hours that residents, what are their average hours per week?

A: For?

Q: Well, while they're rotating at Methodist?

A: For working?

Q: Yeah.

A: Work-hour limitations are 80 a week.

Q: I mean, that's a limitation. Is that around what they work?

A: They vary. Between 75 and 80 typically every week.

Q: Okay, and so of the 70-80 hours a week, about how much time are the residents spending in conferences then?

A: I'd say on average six to eight a week.

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Q: Does having residents work with you free you up to do anything?

A: I don't understand the question.

Q: All right. Well, in certain circumstances, if you have someone else able to do something for you, then you have more time to do something else.

A: If anything, the residents cost me time.

Q: Why is that?

A: Because the education part of it takes a lot of time. Working with them in the operating room typically will slow the operation, as we're doing the education process. I've got to come in at 6:30 Friday mornings **[Page 64]** for an hour-long conference, that if we didn't have residents, I wouldn't have to do. So during that time, I have to do rounds, so I get to clinic on time so my nurses are happy.

Residents usually slow things down and cost us time. That's why there is plenty of people who don't come to Park Nicollet to work as surgeons or don't go to other institutions that are involved with residents, because they want to be in private practice where they can be very, very efficient.

Q: Do residents always work with an attending in the surgery section?

A: They can't, they can't do anything without a surgical attending.

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Q: It's my understanding that –

A: 100 percent.

Q: – you also have faculty appointments?

A: Adjunct, adjunct.

Q: Okay, but Park Nicollet –

A: So our salaries –

Q: Go ahead.

A: Are 100 percent based on what we do – educate. We don't – there is no stipend. We don't get a personal stipend from the U or from anybody else or from Park Nicollet for teaching residents. Can I clarify that?

Q: Sure.

A: There is something called activity points. Out of our salaries every year comes X number of dollars, and those, the dollars then go into a pool of money that then is distributed throughout all staff physicians of this organization. Part of those activity points is getting – and that money, again, comes out of my salary. Okay? It's not coming from the foundation, it's not coming from the U, it's not coming from anybody else.

So out of my salary, money is taken. It gets into this big pool, and then that pool is redistributed to the 600 plus physicians. Each year, we **[Page 75]** fill out a form saying I did X amount of teaching, community balance, things like that, to try and get some of those activity points in terms of money back. It's not a bonus, because I can tell you right now, we as surgeons never get back what we put into this. As

educators, we get a maximum of 30 activity points, 3-0, and so then that – so that we can reclaim part of our salary that was lost to activity points. So we get that in recognition of our educational. See what I'm saying? It comes out of my salary, and I'm still not getting it all back.

And I personally, as the site director, out of our tub, our general surgery finances, get like a thousand dollars a month for doing the stuff I do for residents, for the educational component of it.

So we get nothing from the U for teaching residents.

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Deposition of Dr. Brian Betts (Nov. 8, 2007), Ex. 6 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

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Q: And then during your residency, any idea about how many hours you worked?

A: Well, I'm still a resident now. How do you mean by work, though?

Q: Well, I mean the total time that you're spending devoting to that task, versus having free time doing whatever else you want to do with your life.

A: Again, I mean, it varied on what, you know, what rotation I'd be on, so, I mean, being an inpatient versus on a consult one.

Q: Can you give a rough estimate, 60 hours a week, 70?

A: There is times I'd be pushing close to like – and again, I don't want to say it's work, because I was learning on **[Page 13]** how to be a physician. I'd be in the hospital, if I was on an inpatient one, it would vary maybe from 60 to pushing close to 80 hours a week.

Q: Okay.

A: And that's an average, so.

Q: Sure.

A: That's for inpatient stuff. Consults would be a lot, you know, a little bit lighter.

Q: Okay. Now, for your medical residency at the University of Minnesota, did you enroll at the University of Minnesota?

A: Enroll. Well, there is a process through ERAS where you, where it's a match, as opposed to an enrollment, I believe. So I matched at the University of Minnesota.

Q: You have no recollection of any specific enrollment type process?

A: Enrollment. How do you mean by enrollment?

Q: Well, I'm just using the word to enroll in a school. I want to know if you, other than the match, did you do anything that you're aware of?

A: Well, I was – you know, I'm a resident, student, enrolled at the University of Minnesota.

Q: Yeah.

A: Yeah. But you match there, initially, yeah, so.

Q: So basically, other than the match, you're not aware of **[Page 14]** anything you had to do.

A: Well, how do you mean by do? I'm a little confused.

Q: Well, for example, have you read the residents manual before?

A: Which one?

Q: Well, there is many of them.

A: Yeah.

Q: Have you read more than one?

A: Yes.

Q: You may be aware that the resident manuals refer to the fact that residents are enrolled by the Graduate Medical Program.

A: Uh-huh. I'm enrolled – I'm a student at the University of Minnesota.

Q: Right, and that's why I'm asking if you had to do anything yourself.

A: I'm sure in all the forms, that I had to sign or something, was some enrollment type of process there. But when you asked initially about enrolled, I mean, you match first and then you're enrolled once you match, so.

Q: Was there tuition involved?

A: That I had to personally pay? I don't believe I paid this tuition. I think it was paid through my program. That was my understanding, anyways.

Q: How much was tuition?

[Page 15]

A: I don't know. It was taken care of by the program.

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Q: But was there ever a course where there was zero patient care and it was all didactic?

A: Zero patient care?

Q: Uh-huh.

A: I don't think there is a time in residency at all where there is zero patient care.

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Q: Were you required to take exams in any of your rotations?

A: The in-training exam –

Q: Other than the in-training exam.

A: Yeah. They'd have pre- and post-tests for several of the rotations I can recall, plus you'd have, you know, like oral exam type of thing, where the attending would kind of pimp you on the questions as you're going through, so person would put in an oral exam.

Q: Right, but an attending can ask you questions any time, right?

A: No. The forum changes. I think it kind of has a bearing on, you know, the situation you're being asked the question, so.

Q: Well, I mean, would the attending come in and say this is **[Page 19]** your oral examination and now we're going to sit down and do that?

A: Well, they tell you, I mean, this would be part of your evaluation, and they'd ask you – like during morning rounds, that's kind of like an exam, because they're asking you questions, you know.

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Q: If somebody decided to go to Harvard Law School versus Williams Mitchell Law School, you would agree with me that somebody might be willing to do that because they figured being labeled as a Harvard law student is going to help me down the line in life, perhaps more than William Mitchell will.

A: I see. Like the notoriety of the program?

Q: Yeah. No, not the program.

A: Of the University, yeah, when you say –

Q: No. I'm asking you a very specific question, so pay attention. Okay? I'm asking whether you derive any economic benefit in the future from the fact that you were classified as a student during your residency?

A: A student of the University of Minnesota?

MS. CARLSON: Objection, speculation.

THE WITNESS: So a student of the University of Minnesota?

BY MR. PAHL:

Q: Uh-huh, uh-huh.

A: Well, as a resident, you're a student, and it's a great program, so yeah.

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tuition. Why is that?

A: Well, I knew it would be taken care of for me. That's why I kind of just trusted the University to take care of it.

Q: You don't recall ever getting a document from the University to –

A: I may have, I may have. I don't -- and I may have even heard about the tuition of being -- how did you phrase it?

Q: Suspended?

A: Suspended. Yeah, I may have heard about that, but I didn't know what it really meant to me, other than I knew that the University would take care of it for me.

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Q: Okay, and then you see the next, top of the next sentence there, it says routine conferences?

A: Uh-huh.

Q: Can you see it as morning report, morbidity/mortality, grand rounds, core conferences, journal club, and seminars. What's your best estimate of how many hours per week were taken up with these activities?

MS. CARLSON: Objection, vague as to time. Are you talking about second quarter 2005?

BY MR. PAHL:

Q: Well, just for the record, the questions I'm asking you, **[Page 64]** I'm assuming you're not going to be able to specifically know second quarter of 2005, unless you have – do you have specific knowledge of exactly what took place between April 1st and the end of June 2005?

A: No. I mean, if you're asking me how much time, I'd have to estimate.

Q: Okay, so when I ask you questions about your residency, I'm just referring to basically your residency. If there is anything that's unique about the second quarter of 2005 or anything that doesn't apply to any particular period of residency, let us know. Otherwise, I'll just assume that everything was the same during the periods of your residency. Is that all right?

A: Okay.

Q: Anything you need to change from any questions I asked you before?

A: I don't think so.

Q: Okay, so how many times, the same question, how many times a week did you take up with those activities?

A: That would be a total of ten hours.

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Q: Okay. While a resident, did you have what's know as an educational expense allowance?

A: Yes, uh-huh.

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Q: Well, let's – you would physically examine a patient, correct?

A: Uh-huh.

Q: You would take a history?

A: Yup.

Q: You might order a test?

A: You'd talk about it usually before you order something.

Q: Okay. At some point, would you make a diagnosis yourself?

A: Well, you'd – yes, but you'd discuss with the attending and say, hey, I did this, this, this, I think it could be this; and then they would say, well, let's check out this, this, and this. You know, that kind of thing.

Q: Okay, so would it be fair to say you took part in a –

A: Yeah, it's more of a –

Q: In a patient care, patient care plan?

A: Yeah, because ultimately the attending is the responsible person to say, hey, you have this disease or whatever.

Q: Could you admit patients to the hospital?

A: No. It was the attending.

Q: Always the attending. Okay. How about discharging patients?

A: Again, attending's got to put their signatures on it.

Q: Could you discharge somebody and then the attending sign off it, sign off later?

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A: That shouldn't happen, but that could occur.

Q: How about admissions, could you admit without a – like if it was the middle of the night –

A: Yeah.

Q: – you'd have to admit somebody and wait for the attending to come in later?

A: Yeah, but if there is something going on, we're like, man, I don't know what's going on or this is bothering me, I'd just page the attending; and sometimes they'd actually come in, so.

Q: I guess when someone comes to the hospital, we're talking about admission, and you look at them.

A: Yup.

Q: Is the question whether or not to admit them? In other words, you don't – do you call the attending because you want to make sure that your decision to not admit them is correct, or do you call the attending because – do you understand that?

A: Yeah. No, once they're admitted, they're admitted. There is not really much the resident can do to say, wow, this is a, like a, quote-unquote, weak admission or something like that, which I never liked that terminology. But, yeah, the ultimate decision to admit someone, it's under the attending's name.

Q: Okay. Did you prescribe medications for patients?

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A: Yeah.

Q: Okay, and could you do that without attending approval?

A: No, because it would always be you'd talk to the attending.

Q: Okay. Could you direct nurses to do things for you?

A: Uh-huh.

Q: How about, did you have to input codes?

A: Okay, so at the VA, there was a coding system that you'd click on to say high severity or something like that, but that was it. It was only at the VA, and I honestly didn't really know much about it, other than we had to do it.

Q: Could you direct a medical student to do something, like remove a dressing?

A: That would be the nurse doing that.

Q: You wouldn't.

A: Yeah.

Q: I mean, was there anything you'd direct a medical student to do on their own?

A: Yeah, yeah. Like check vitals, if you were wondering about something, you know, repeat the set of vitals.

Q: Did you have to write daily progress notes on patients?

A: Uh-huh.

Q: Okay. Is that like filling out a chart? Maybe it's computerized now, but –

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A: Well, some of them are still paper. But yeah, you'd write a little note saying, you know, your thoughts on the patient and if you examined them.

Q: You said you couldn't discharge the patient without approval of the attending, correct?

A: Uh-huh.

Q: Okay. Did you write up the discharge summary yourself?

A: Yeah, uh-huh.

Q: And then the attending would review it.

A: Yes.

Q: And then sign it?

A: And then sign it off.

Q: If someone was being released from the hospital, would you sit down with the family members to talk to them about post-hospital care?

A: I'd try to, yeah, yeah. Actually, yeah, I did do that. You'd have like a little family meeting to try to do that.

Q: Could you do that on your own without an attending?

A: Yes, but the attending would usually follow it up or talk about it beforehand. I just like the continuity, make sure the patient's got good care and knew what the plan was.

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Deposition of Dr. Angela House (Nov. 29, 2007), Ex. 7 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

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Q: Okay, and give me an example of when you would just go by yourself to meet with the patient.

A: The typical situation was going by myself to see a patient as a second- and third-year resident.

Q: Okay, and as a first-year resident, how is that different?

A: As a first-year resident, attending physicians came with us more often.

Q: I see, okay. So sometimes you'd be off as a second- or third-year visiting a patient and the attending couldn't be with you because they were with a first-year, I would assume.

A: Yes.

Q: So when you would meet with a patient by yourself, what would you do with the patient?

A: I would talk to them about how things went since the last time I saw them the day before, or since the last time another physician saw them. I would do a brief physical exam, let them know of any results from tests, and let them know what the plan was for the day and, if known, the plan for the rest of their hospital stay.

Q: And how long does it take to visit a patient?

A: It could take anywhere from a few minutes to an hour.

Q: Okay, and were you required to write down notes of what **[Page 13]** you had done with the patient?

A: Yes.

Q: And what kind of document would that be called?

A: A progress note.

Q: A progress note.

A: Yes.

Q: And you would sign that?

A: Correct.

Q: That would become part of the patient's file?

A: Yes.

Q: When the attending – if an attending went to visit a patient, would the attending look through progress notes, would that be something they would usually do?

A: Well, first, it's not if an attending went to visit a patient. They visited all the patients that we saw, and they would look at our progress note and then write a brief note after that.

Q: Is there something different that you call the attending's note?

A: Yes. It's the attending's note, yeah.

Q: Is it labeled attending's note or is it just because they sign it that it is known as the attending note?

A: I have to say I don't remember what they label it.

Q: And typically, how many patients would you have?

A: Oh, anywhere from one to seven.

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Q: Did that number change at all from your first year as a resident?

A: It increased.

Q: And how many would you typically have as a first-year then?

A: The average was four to five.

Q: As a first-year?

A: As a first-year.

Q: And do you know why you were able to see more patients as a second- or third-year?

A: Because you become more efficient.

Q: Doesn't take as long to do the tasks you just described?

A: Correct.

Q: Okay, and so let's say you had gone through – is there a name for what you're doing when you go visit each of your patients?

A: It's rounds.

Q: That's rounds, okay. That literally sounds more like a round, okay, although maybe up, down, horizontal.

A: Uh-huh.

Q: Okay, so you just finished your rounds, you wrote up progress notes. Well, when you're doing rounds, did you ever have occasion where as a result of your interaction with the patient, you decided that you needed to see an attending right away?

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A: Yes.

Q: Okay. What would you do then?

A: I would ask the attending to talk with me right then.

Q: Okay. They typically would come down?

A: Typically we are all in the same work area.

Q: Oh, I see. Like so in like a ward, I guess you would say?

A: Correct.

Q: Or a floor?

A: Correct.

Q: Would that be basically what we're talking about?

A: Uh huh.

Q: And when you were doing your rounds, for example, could you write a prescription?

A: I could make an order.

Q: Make an order, okay. Tell me what an order is.

A: It's a request for medication or a service that we enter in the computer.

Q: And I was in Fairview last night. There is actually a computer in the room. Is that routine?

A: Yes.

Q: And it actually says the patients aren't supposed to use it.

A: Yes.

Q: And that's the computer you would use right there to **[Page 16]** write up something?

A: Not typically.

Q: Oh, you wouldn't. Why wouldn't you use the computer?

A: I guess as a matter of practice.

Q: You physically write out on a piece of paper or something?

A: No. I would use the computer in the main work area.

Q: Okay, I'm sorry. You would just go back to your main work area.

A: Correct.

Q: And you would put in, either write a prescription or – what are the other orders you're talking about, the things that you could have done?

A: Yeah. Elevate patient's leg, give them a regular diet or a diabetic diet, check vital signs every two hours or every four hours.

Q: And could you do that without having it approved by the attending?

A: Without having it approved immediately by the attending, yes.

Q: I mean, so, for example, you just mentioned a diabetic lunch or meal. Is that correct?

A: Yes.

Q: I assume possibly you could have a patient where you didn't know they were diabetic or something, and all of a **[Page 17]** sudden you learned it and I've got to get him a different meal, perhaps?

A: Yes.

Q: And if lunch was coming up, would they serve the diabetic meal before the attending had signed off on your order?

A: Yes.

Q: Were there any things that you were – you could prescribe drugs. Is that correct?

A: Yes.

Q: You just said. How about a controlled substance?

A: Yes.

Q: You could do that?

A: Yes.

Q: Without the attending?

A: In the hospital, yes.

Q: Would the attending have to approve it later?

A: Yes.

Q: But it could be administered at your direction before the attending signed off.

A: Yes.

Q: Okay. Were there any procedures that you were not allowed to order to be done, without the attending I guess contemporaneously signing off, I mean literally next to you saying you can't do this on your own, I've got to do it?

[Page 18]

A: You said procedures. Do you mean procedures?

Q: Well, you probably know the answer to your own question. I understand it's a little bit vague. I'm talking about, is there anything that when you went back – so let's suppose you examine a patient, you go back to your computer. Is there anything that you might think should be done with this patient, and done right away, but you were not authorized to

do without the attending signing off before it was done?

A: Yes. There would be things that we wouldn't do prior to talking with the attending. For instance, a procedure that we had never done before or that we hadn't done enough times to feel comfortable to do on our own. We could write – I'm not aware of any prescriptions that we couldn't write. There may have been, and I didn't come across that. However, if there was something that I hadn't done before or hadn't done routinely, that would be an occasion for me to pause, wait to talk with an attending and prescribe it. Yeah.

Q: Can you give me an example of one where you actually had to pause and said I need an attending to come in before you do this?

A: Well, for instance, there are delivery devices for narcotic medications that patients can control, and they take some time to figure out how to fill out the proper [Page 19] form to figure out the dosages and so on. That would be something that I would speak with an attending first prior to letting that through.

Q: Anything else?

A: Every medicine that's ordered also goes through a pharmacist who approves it as well. There is a chain of people who take a look at things just to make sure that nothing slips by that's inappropriate.

Q: When you were a resident, if you had a friend that said, I don't know, my knee is sore, I'd like to get a Celebrex or something like that, were you authorized, could you have written a prescription for someone?

A: I could.

Q: You could, because you were a doctor?

A: Correct.

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Q: If a patient went into cardiac arrest when you were in the room, are you the primary physician to save that person's life?

A: I would be on the code team, which is a number of people who respond when somebody has an emergent situation in the hospital.

Q: Oh, okay, so – and did you know when you started your shift if you were on the code team for that day?

A: Any resident who is in the hospital, in the family medicine at least, and wasn't otherwise occupied by something important, was required to go and respond to codes.

Q: Is the attending required to respond to codes?

A: No. Not in family medicine.

Q: Why is that?

A: Attending physicians are not – many of our attending physicians were not ACLSs, advanced cardiac life **[Page 31]** support certified. The code team, and many code teams around the country, are not run by attending physicians, they are run by a collaboration of nurses and sometimes other doctors, for instance, an anesthesiologist, who is a physician but not our attending physician. So the team doesn't always involve the attending physician who is caring for that patient.

Q: So are all residents – all residents are members of code teams.

A: All residents are ACLS certified, in family medicine, at least, I can speak for that.

Q: Okay. I guess that the attendings may never have been certified in this procedure, you're saying?

A: At one time, they were probably all certified to go through their own residency, and it is their, as far as I know, it's their choice whether they keep up that certification, and typically the physicians on the internal medicine side, who are more in the hospital more often, would be certified in ACLS, and they would show up at our code. Those in our family medicine program may or may not have been ACLS certified and may or may not show up at the code. They are not required to.

Q: What is ACLS?

A: Advanced cardiac life support.

Q: And I'm assuming these are classes that basically if they * * *

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Q: When a patient needs to be discharged, would you write up a discharge note?

A: What do you mean?

Q: All right. For a patient to be discharged from a hospital, does there have to be a note written up?

A: There needs to be a note written, a progress note, once every 24 hours. So anybody who's still in

the hospital the next morning will be seen, a note will be written. In addition if somebody is there for more than 48 hours, they need a discharge summary, a summary of what happened during their hospitalization.

Q: Did you write those?

A: Yes.

Q: Okay. Could you sign off on those, or did the attending have to sign off on them?

A: To clarify, I didn't write them. I dictated them on the –

Q: Sure.

A: And the supervising physician needed to sign off on those.

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Q: Okay, so literally, the supervising physician might just read through everything you had dictated, and if that was correct, would just sign a name to it?

A: In the discharge summary, yes.

Q: How does the decision get made that it's okay to let a patient go home?

A: There are lots of things that go into that decision. Basically, if a patient is stable, can be cared for, can care for themselves, themselves at home, and if there is any further need for care, is able to go into the clinic, that's a time that you discharge a patient.

Q: Could you do that yourself as a resident?

A: Do what?

Q: In other words, could you examine a patient and say this guy's ready to go home, he doesn't need to be here anymore, and could you sign off on something to let them go?

A: I could sign something, but prior to anybody leaving the hospital at any time, an attending physician needs to sign off on that and see them.

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Q: How did you physically enable yourself to work like a day shift and then a night shift, how were you able to do that?

A: Well, you get rest when you can, you eat when you can, you take care of yourself when you can, and that's how you do it.

Q: Okay, so in terms of the, I think you talked about, was it 7:30 to 6:30 was your day shift in the hospital?

A: Yes.

Q: And then you did some time at home, correct?

A: Yes.

Q: So on a typical day, how much time were you spending devoting to this residency for at least the night portion?

A: If you're talking about a typical day when I'm in the hospital.

Q: Yeah.

A: A typical day would be a total of 12 to 13 hours.

Q: Okay, and then how many days in a week would you have to **[Page 45]** do that?

A: That would be five days of the week and then some rounding on the weekend, which is typically a half day.

Q: Both Saturday and Sunday?

A: Sometimes, and sometimes neither.

Q: And you were a science major, so you're better with numbers, so how many hours total would that be?

A: I would say average number of hours through the month would be somewhere around 70 when I was on my hospital rotations.

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Q: Okay, so let's take a typical visit to the clinic. Okay?

A: Uh-huh.

Q: Can you give me a time, like what time you arrive?

A: Quarter to 8:00.

Q: Okay, and what would you do when you got to the clinic?

A: I would look at my list of patients, review their charts, **[Page 47]** bring any concerns or plans I felt I could make prior to seeing them to the supervising physician and discuss that at that time, discuss my plans and concerns with the nurse.

Q: Okay, and about how long would it take you to do this preliminary work before you started talking to patients?

A: About 15 minutes.

Q: And the patients that you were seeing in the clinic, is this what's known as a continuity clinic, were they patients at the hospital first and then – sorry. Did you know these patients before, from being in the hospital, is what I'm saying.

A: Most of the patients were not people who had just been to the hospital, as most of our population isn't, aren't people who go to the hospital frequently.

Q: Okay, so these are just people who are going to the clinic.

A: Yes.

Q: Patients at the clinic. Okay, and after that, I guess you said 15-minute consultation with the nurse or the attending, what did you do then?

A: I started seeing patients.

Q: When you saw patients at the clinic, did you typically see them by yourself?

A: As a second- and third-year resident, I typically saw **[Page 48]** them by myself.

Q: Okay, so tell me what you did as a first-year when you went to see a patient in a clinic?

A: As a first-year, I would see a patient on my own and then bring the attending physician in with me after discussing that patient with him, and what was, to clarify, that's for part of the first year. I don't know when, I don't remember for the exact time when the attending stopped going in as frequently.

Q: I see, but typically it was during the first year?

A: Yes.

Q: Do you know, was there any reason you can think of that the attendings didn't really need to go in with you anymore as a first-year?

A: When the attending has decided that the first-year resident is competent enough to see the patient and present an accurate history and physical back to the supervising physician without them going into the room to see the patient, then that's when they decide that they can go on their own most of the time.

Q: And in a clinic, about how much time would you spend in terms of your initial, you know, visiting with your patients?

A: How much time would I spend with a patient?

Q: Well, when we talked before about like you would do like **[Page 49]** an hour or so in the hospital, hour and-a-half, and then you'd go back to the residents room, so I'm trying to ask you what you did at the clinic. After your initial 15 minutes, and then let's take it when you were second- or third-year, about how much time did you spend meeting with the patients?

A: Patients have – I would spend about 15 to sometimes 30 minutes or a little bit longer, if they were a complete physical. I would spend that time with the patient, and then I would talk to the supervising physician.

Q: Okay. After you had done that, would the supervising physician typically come in and meet with the patient?

A: In the second and third year?

Q: Yeah.

A: Not typically.

Q: Okay. There wouldn't be like, you know, I don't know, when you're in a doctor's office and one doctor is talking to you and then like the other guy, the older guy comes in. That would be more typical with a first-year?

A: In family medicine at Smiley's, yes.

Q: But when you got to a second- or third-year, the patient didn't need to meet with the supervising physician, is what you're saying.

A: Not usually.

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Q: Okay, and as a second- or third-year, could you write orders for the clinical patients?

A: Yes.

Q: Okay, and tell me what type of things you would write an order for.

A: Medicines, usually.

Q: Anything else?

A: Oh, devices, compression stockings, blood pressure cuff.

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Q: Okay. Well, I mean, you were in the University of Minnesota Graduate Medical Program, the residency program.

A: Yes.

Q: In order to graduate or to finish up that program, did you have to do certain things?

A: As part of our program at Smiley's, we were required to do certain things. We were required to do a journal club presentation, we were required to do projects at the end of certain electives, for instance, that elective that I did, maternity elective; and so yes, there were those **[Page 59]** kinds of activities that we were required to do.

Q: What did you do for journal club?

A: I researched the use of Plan B and its over-the-counter status.

Q: Of Plan B?

A: Plan B, the morning-after pill.

Q: Oh.

A: And I made a presentation on that and talked about it, the change in its over-the-counter status, to our residents and faculty.

Q: Did you do that in a conference room?

A: Yes.

Q: How many people showed up?

A: I don't know the specific number. Maybe 20 to 30.

Q: And how long did it take you to do the preparatory work?

A: I don't know how many hours. Many hours.

Q: Many hours. Do you know whether you were a student when you were a medical resident?

A: I believe myself to be a student.

Q: And why do you say you believe yourself to be a student?

A: Because my primary purpose in residency was to learn.

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Q: Oh, you took it out on student loans, okay. And when you went to your residency program, did you have to pay tuition?

A: Yes.

Q: How did you pay your tuition?

A: I don't exactly know. I think it was taken out of my, of the stipend that I got.

Q: Do you know how much it was, approximately?

A: No.

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Q: When you went in your residency program, did you have any courses?

A: I believe I was registered for courses, but the way that we discuss what we do is called rotations.

Q: You said you believe you were registered, so you don't know whether you were registered?

A: I think I was registered, but I did not do the registering.

Q: Okay. Who did that?

A: I don't know.

Q: What did they register you for, do you know?

A: I don't know.

Q: Did your medical residency program have any course credit requirement?

A: They had requirements, but they weren't discussed with us as course credit requirements.

Q: So you don't know whether a rotation would give you 15 credits or one credit, you have no idea.

A: No.

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Q: Do you know whether you ever had a transcript – did you ever receive a transcript from the U of M medical residency program?

A: I don't know.

Q: When you were a medical resident, did you refer to yourself as a doctor to other persons?

A: I did, as a resident doctor.

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Q: Okay, I just want to look through my notes real quick here. I think you mentioned before, have you ever actually seen something called a transcript for the residency program?

A: I don't recall seeing it, and the only time I've seen other transcripts is when I'm applying to do something else, which I have not done yet after Smiley's, so.

Q: Do you know whether, when you were a resident, there was a course number given for certain rotations you were on?

A: I know there are course numbers, but I don't know what they were for the rotations, because I did not register myself for the courses.

Q: Did you ever have as part of a rotation an instance where you would have one person from the U of M as an instructor, for example, and there was something like 175 medical residents, fellows, and students all in one room as part of a course?

A: I'm sorry, can you repeat that question for me?

Q: Okay, all right. have you ever heard a course called clinical medicine at the University?

A: Yes.

Q: And do you know what that is?

A: No.

Q: During your residency, did you ever have an instance where there was you and like 170 other residents, medical **[Page 101]** students, etc., all in one room where you were informed by somebody that you are now taking a course called clinical medicine?

A: No.

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Deposition of Dr. Louis Ling (Dec. 14, 2007), Ex. 8 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

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Q: What do you have to do to become a faculty attending?

A: To be on the faculty, you have to be a member of a department and participate in department activities.

Q: Member of the department where?

A: At the University.

Q: Do you get paid to be a faculty at the University of Minnesota?

A: Some do, and some don't.

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Q: Has there been any changes in the University of Minnesota's Graduate Medical residency program as a result of the ACGME duty-hour requirements?

A: Yes.

Q: How has it changed?

A: That duty hours have become restricted, so that the assignments for the residents have changed to comply with those.

Q: Prior to the change, were the residents working more than 80 hours a week?

A: Perhaps, but not always.

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Q: Any other change?

A: And I think some residents were excused from conferences or other activities, again, so that they could finish up their activities before the 30-hour limit expired, basically.

Q: So a resident could skip a conference if they were worried about the duty-hour requirement?

A: Correct.

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Q: Do University of Minnesota medical residents regularly attend classes?

A: And what do you mean by classes?

Q: Well, when you hear the term classes, what do you think?

A: Well, I think residents learn in many ways, and so they can attend lectures, which might be an

old fashioned term for a class, but much of the learning that they do is learning through experience, in fact, we call it experiential learning, and so some people might not consider that a class, but it certainly is a good way of **[Page 37]** learning.

Q: If you were to describe the learning that residents do, would you use the phrase regularly attend classes?

A: Well, they are constantly learning, so they regularly attend conferences.

Q: But you wouldn't use the term regularly attend classes?

MS. CARLSON: Objection, asked and answered.

MR. PAHL: Actually didn't answer this, so.

THE WITNESS: Well, I guess if you say a class is sitting in a room and listening to someone speak, then I don't know if it's different than a conference, because oftentimes, that's what they do.

BY MR. PAHL:

Q: Okay, so when you use the word conference, what do you mean by a conference?

A: Well, conference is a formal didactic session.

Q: And so residents do have formal didactic sessions?

A: Yes, they do.

Q: Tell me what to you is a formal didactic session?

A: Where it's something that's planned, as opposed to something that you just learn as you're going through the experience.

Q: Okay, and what are examples of the planned formal didactic sessions?

A: Well, it could be a specific lecture on a given topic or **[Page 38]** it might be discussion of cases that are currently going on and what's the best management or diagnostic strategy of those cases. It might be a review of current cases and trying to find out if there is ways that we could do things better. It could be discussion of current research. It could be just a discussion of other aspects as far as how to communicate better and how to perform the activities that a physician has to do.

Q: Does the University of Minnesota Graduate Medical Program have any formal titles for what you would refer to as planned formal didactic sessions?

A: Well, typically, the residency programs call them conferences.

Q: Would noon conference be an example?

A: That would be the name of a conference, yes.

Q: Are there any other names for these formal didactic sessions, that you're aware of?

A: Well, each program picks their own name, so grand rounds would be a common name, morbidity and mortality would be another common name, journal club, but there are probably many others.

Q: What does the term rounds mean to you?

A: Rounds generally is a time period when doctors go around and see the patients, or discuss the patients, and can include both patient care decisions and education.

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Q: When you say doctors do the rounds, are you putting residents in the term doctor?

A: Yes.

Q: And when a resident does rounds, does he do it by himself or does he do it when an attending?

A: Well, they can – it can be any of those formats, so it's a very general term.

Q: Could you use the term round to describe a resident visiting with five patients in a row and then later discussing what he learned with an attending?

A: Yes.

Q: You would call that a round.

A: Sure.

Q: But you would not call that a conference, would you say?

A: Well, I think just in the usual way that doctors talk, we call it rounds.

Q: Do you know whether residents receive grades at the University?

A: Well, generally we think of it as a pass-fail endeavor.

Q: So you don't know whether they receive a letter grade.

A: So I would be surprised if they receive a letter grade.

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Q: And is there a shift in the roles and responsibilities of a resident at a hospital on the first day of his residency as opposed to what the same person did as a medical student while rotating at a hospital?

A: Yes.

Q: Okay. What are the differences?

A: Well, it's a formal recognition that they have become more capable as they progress through medical school, and so once they become a resident, they have graduated from medical school, and so they have more independence in their responsibilities.

Q: A doctor starting on the first day of residency could write an order?

A: Yes.

Q: The doctor would sign the order using M.D.?

A: Yes.

Q: The doctor on the first day of the residency could write a prescription?

A: Yes.

Q: The doctor on the first day of residency could request a consultation?

A: That would depend.

Q: Okay. Doctor on the first day of his residency can write notes to a file?

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A: Yes. Again, all of these activities, when they're residents, are under supervision.

Q: And who are they supervised by?

A: By the faculty physician.

Q: Now, does the faculty physician have to be with the resident at all times during the residency?

A: No.

Q: So they're not physically present for everything a resident does.

A: Not for every single thing.

Q: Do you know what a lumbar puncture is?

A: Yes.

Q: Residents are taught to do a lumbar puncture?

MS. CARLSON: Objection, overbroad.

THE WITNESS: Well, medical students and residents are taught how to do lumbar punctures.

BY MR. PAHL:

Q: Is it correct that some residents, they reach a point where they can do a lumbar puncture without an attending physician being physically present?

A: Some residents will develop the skill where they can perform the procedure without any assistance.

Q: Is that also true for a paracentesis?

A: So, I mean, these are physical skills, and so I think as people get enough practice, they can perform them, but I **[Page 63]** think there is a lot to it, I mean, as far as the reasons to when to do it and when not to do it; and so at some point, yes, individuals can do it, but, you know, I think every time you do a procedure, there is a chance that something can go wrong, and also there is a chance that you can learn something from it, and so that probably never stops.

Q: Including for you.

A: Including for me.

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Deposition of Dr. Peter Duane (Oct. 25, 2007), Ex. 9 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

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Q: Are you aware of the 2003 Accreditation Council Graduate Medical Education requirement that residents work less than 80 hours a week?

A: Yes.

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Q: What changes took place to the U of M program based on the 2003 ACGME 80-hour cap?

A: I think largely with respect to the 80 hour cap, the changes that we instituted were systems to monitor the number of hours residents spend in the hospital on selected rotations.

Q: Okay, so in terms of internal medicine, what were the selected rotations that were of concern?

A: These were largely courses that involved inpatient medicine.

Q: Can you give me a few examples of what courses those would be?

A: Critical care medicine, inpatient ward medicine, general medicine, cardiology rotations, inpatient cardiology rotations.

Q: Are those rotations ones in which there is a concern **[Page 85]** about hitting that 80-hour limit?

A: That was the purpose of the monitoring.

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Q: Did the VA have to hire any more physicians as a result of the 2003 change?

A: That was another thing we did. We hired and started a house doc, which is a physician that's not associated with the program that would take care of patients outside the residency program for the hospital.

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Q: Let's go back to that 80 hours we were talking about. For your residents, of the 80 hours they spent working, how much time of that was set, was in a classroom setting, in an 80-hour week?

A: So can you tell me what you mean by classroom?

Q: Okay. Well, I guess going back to what I've talked about before, where you're actually, they're sitting down, someone's lecturing to you, you're not

seeing patients, much like say an undergraduate class would be. Of the 80 hours and using that definition, how much of the time would have been spent in a classroom setting?

A: I would hazard a guess of around ten to 15 percent of **[Page 90]** their time.

Q: How much of the time would have been spent doing patient care-related research?

A: Research?

Q: Well, let me see if I can define it a little bit. I guess what I would mean there is you come across a patient and you maybe say I want to read a little more of the literature –

A: Yeah.

Q: – so I know what's going on and I can come back and help this person better.

A: Uh-huh.

Q: How much time of the 80 hours a week would be spent doing that?

A: Another ten to 15 percent.

Q: What percentage of time would be spent doing what I will call independent study? And I'll try to define it for you as simply somebody says, you know, just generally I want to sit down with a book and read more about internal medicine, any topic under the sun. How much time or what percentage of time of the 80 hours would be spent doing that?

A: I think that would be similar to the response I just gave you, which is about ten to 15 percent of their time would be done doing that.

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Q: Do you mean separate from the patient care-related research or encompassed therein?

A: I would not distinguish the two.

Q: Okay, so classroom setting, patient care-related research, and independent study will total up to about 30 percent? Excuse me, excuse me. That would be anywhere from 20 to 30 percent. Would that be fair?

A: Yes.

Q: So using again the 80-hour week, what percentage of the resident's time is spent in direct patient care, the remaining 70?

A: Well, can you give me a better idea of what you mean by direct patient care activities?

Q: In a hospital –

A: In a room with a patient?

Q: Well, with patients, performing not only with a patient, but doing the tasks that are related to patient care, which could include, you know, writing up things and histories and all that type of stuff. Everything that is not those other three categories we talked about.

MR. TINKHAM: Object to that as vague then. Go ahead.

MR. PAHL: Well, he seemed to understand it.

MR. TINKHAM: Well, I can tell you that I don't, so that's why I made my objection.

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THE WITNESS: I'm having trouble too. Would that include things like teaching rounds?

BY MR. PAHL:

Q: Yeah. I –

A: Which I haven't included in that 20 to 30 percent.

Q: Right. I would include all of that, teaching rounds, etc. Would that be the remaining 60 to 70 percent of time?

A: Uh-huh.

(Court reporter asks witness to answer out loud.)

THE WITNESS: Yes.

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Q: When residents apply to a program, do they know who the physicians are that they'll be working with if they get in the program?

A: Well, these are medical students who are applying.

Q: Right.

A: They may know some, but certainly not all, but they'll know some, and some may specifically attract them to the program.

Q: That's what I wanted to –

A: Do you have children?

Q: I do, yes.

A: Are they of college age?

Q: No.

A: Well, I have kids who are going into college, and our interview day is exactly the same as what I'm going through with my daughters in applying for college.

Q: Yeah.

A: It's exactly the same process. Doesn't feel like a job interview, though. It's a discussion about the program, a tour of the site, and an interview is con-

ducted that would be very similar to what your children would go through when they apply to a college.

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Deposition of Dr. James Van Vooren (Nov. 9, 2007), Ex. 10 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

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Q: What are you referring to?

A: Well, there are three occasions that come to mind. One is that we have a regular noon conference series with a, it's in a lecture format, that occurs daily. The hospital has a grand round series that occurs during winter months once a week. And our residents, when they're on the obstetrics rotation, have a similar session with an obstetrician four times a week.

Q: Noon conferences, how often do those take place?

A: Monday through Friday.

Q: Okay. There is one offered every day?

A: Yes.

Q: And what is the attendance requirement for residents?

A: Sixty-six percent.

Q: And the grand rounds, can you tell me what that is?

A: The hospital has a series directed towards primary care physicians on topics in primary care.

Q: And are residents required to attend those?

A: Yes.

Q: What's the requirement?

A: The same.

Q: Sixty-six percent.

A: Yes.

Q: Why are they only offered in the winter?

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A: That's the hospital's choice to give a break during the summer.

Q: I see, okay.

A: Tradition.

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Q: Are the University of Minnesota residents required to purchase any textbooks?

A: No.

Q: Do they receive letter grades?

A: I don't know.

Q: Are they required to take written exams?

A: Yes.

Q: Okay. What exams?

A: They're required to take a national family medicine in-training examination.

Q: Is that the same exam that's offered to your residents throughout the country?

A: Yes.

Q: Other than that, are the residents required to take any written exams?

A: Yes.

Q: What exam?

A: Our residents have – our department has a series of programmatic workshops that cover various topics in **[Page 19]** medicine, and most of those workshops have a written examination at the end of the workshop.

Q: And who grades the – or who reviews the residents' written work?

A: Well, it depends what you're referring to.

Q: Well, you just referred to –

A: The programmatic workshop –

Q: Right.

A: – grade, right. They're reviewed by the course director for the workshops, and also by the program director.

Q: And what, if anything, do you do with the – do they receive a letter grade for those written exams?

A: They do not receive a letter grade. They receive a percentile score, absolute correct and incorrect score.

Q: And then what's done with that percentage?

A: If the residents don't receive an adequate percentage, they are required to remediate either part or all of the course.

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Deposition of Dr. Bradley Benson (Nov. 8, 2007), Ex. 11 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

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Q: Can a resident write a prescription for a patient without contemporaneous approval by an attending?

A: When I – so as part of the discharge process, there is, there are, there is a medication list this is signed off on by the discharging resident and by, and reviewed by, you know, appropriate mechanisms, which are in place at each of the hospitals. I only know our system, and the attending physician does not need to sign the discharge paperwork, but the discharge dictation is reviewed, edited, and signed, which lists those medications.

Q: So the answer to the question is no, the attending does **[Page 101]** not have to contemporaneously approve the prescription.

A: So – I would have to say that in – I can't say that in every instance they do need to contemporaneously approve. So at our clinic, they do, because it is an electronic prescribing system that has to be signed off on explicitly by the attending physician before it is faxed to the pharmacy.

Q: Have you ever heard of the phrase see one, do one, teach one?

A: Yes.

Q: And from what context have you heard that?

A: In the context of procedures.

Q: Okay, and is that something you, is that something you encourage your residents to practice?

A: Absolutely not.

Q: Why is that?

A: Because there clearly is – so procedures are a competency like any other, and again, our primacy is patient well-being and patient safety, and we need for learners to be competent in performing a procedure before they do so. They need to be supervised by someone who is competent, and we certainly follow the ACGME guidelines, but, you know, I think, again, this is an ongoing area, where teaching programs are improving our ability to ensure and document competence before a learner's ever [Page 102] able to be involved in a procedure.

Q: Are residents required to teach medical residents?

A: Are residents required to teach other residents.

Q: I'm sorry, yes, I'm sorry, let me rephrase that. Are residents required to teach medical students?

A: Residents are required to supervise medical students, which does not involve teaching.

Q: And senior residents, are they required to teach more junior residents?

A: Yes.

Q: So you would agree that residents are both learners and teachers at the same time.

A: I would use the analogy that, as we have in the medical school, that third-year medical students teach, can teach first- and second-year students, and there are examples on how to do that, the same with fourth-years helping third- and second-years, and I do agree that one of the competencies that we want our residents to leave with is the ability to effectively teach.

Q: Who is it that directs the resident as to how he or she is supposed to treat a patient? Who is the most primary person in that task?

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Deposition of Dr. Jared Austin (Nov. 29, 2007), Ex. 12 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

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Q: Okay, so about how many hours a week then were you working on this type of schedule?

A: Around 70 or 80.

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Q: When you were in the residency program, were you a student at the University of Minnesota?

A: Yes.

Q: How do you know that?

A: I have a student ID.

Q: Anything else?

A: I get student discounts at the orchestra. I had access to the student gym.

Q: Did you go to the student gym?

A: I did.

Q: Were your privileges at the gym curtailed at any point?

A: I'm not sure. I only went for a couple months during my second year, and I really have not been back, so I'm not sure whether I still have access or not.

Q: And did you go to the orchestra?

A: I did.

Q: That's the U of M orchestra?

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A: No. Actually, this was the Minneapolis, or Minnesota Orchestra, that plays a few blocks from here.

Q: Did you get some type of student ticket?

A: I did. I got a student discount on my tickets.

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Q: Did you pay tuition to be a student?

A: I didn't personally pay tuition.

Q: Do you know whether or not tuition was paid?

A: I believe it was paid, but I'm not positive about that fact.

Q: Do you know how much tuition was?

A: No.

Q: When you were looking into residency programs, did you learn at that time that there was a tuition requirement at the University of Minnesota?

A: I did not.

Q: So when you started your residency program, did you not know whether there was a tuition requirement?

A: I didn't know.

Q: Were you required to register as a student at the University of Minnesota?

A: I believe so.

Q: What do you believe you did?

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A: Well, I know that I got my student ID card, and along with that I got a University of Minnesota e-mail account; and other than that, I'm not aware of anything else I did to register as a student.

Q: Did you yourself ever have to register for courses?

A: No.

Q: Do you know whether or not you were registered in courses?

A: I have heard that I am, but I never registered myself.

Q: Who would you hear from that you were registered in courses?

A: I heard from my lawyer.

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Q: When you were in the residency program, did you regularly attend classes?

A: Define classes.

Q: Well, I think you just answered the other two questions, so use the same thing that you have in mind.

A: Okay. Yeah, I'm going to assume classes are the same as lectures; and in residency, indeed we do attend lectures regularly.

Q: Okay. Tell me what – how do you regularly attend classes?

A: I walk to the lecture room and sit down and listen to a lecture.

Q: Was there a specific name for these lectures?

A: Sometimes they're called noon conference. The other is, it's morning reports.

Q: And in a typical week in the hospital, how often would you have a noon conference?

A: Which hospital?

Q: Any of your hospitals.

A: Okay. Typically noon conference is every single day.

Q: Were you required to go to all of them?

A: Yes.

Q: Did you go to all of them?

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A: No.

Q: Why not?

A: Occasionally on the floor, there would be too much work to do or you would have an ill patient that would need attention.

Q: Was there a percentage requirement of the number of noon conferences you were required to attend?

A: Not that I'm aware of.

Q: No one ever told you something like that?

A: No.

Q: When you went to noon conferences, did you have to sign in?

A: Yes.

Q: Okay, and I think you also mentioned, was it the morning report?

A: Yes.

Q: Tell me what that is.

A: Morning reports is basically a display of an interesting case with some teaching elements to the case.

Q: And who would typically attend the morning report?

A: Typically all the house staff would attend, along with some of the attendings.

Q: And who would present at the morning report?

A: Typically one of the teams or one of the residents on one of the teams would present the case.

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Q: When you were in a hospital, were you a member of a code team?

A: Yes.

Q: Did you ever have a code blue?

A: Yes.

Q: Tell me what happened.

A: Well, the typical scenario is that a code is called overhead. The senior resident that's on call carries a code pager, and that pager will go off. When you hear where the code is taking place, the room, you'll dash up to the room, and then proceed to handle the code.

Q: Were you a member of a code team – when were you, sorry, when were you a member of the code team?

A: As – well, what do you mean by a code team?

Q: Well, I'll ask you. What is the team that is supposed to respond to a code?

A: Right. So any physician within the hospital can respond to a code.

[Page 42]

Q: Okay.

A: The people who have to respond to the code, which I assume you're referring to as the code team, would be the senior resident on call, usually an emergency room doctor in that setting, the PICU intensivist, anesthesiology, respiratory therapy, and then occasionally an intern or medical student. The medical students really aren't on the code team, but they'll usually show up just to see how things are run and help out if they can.

Q: Given that group of people you just described, like the anesthesiologist.

A: Right.

Q: Am I correct that the anesthesiologist would not be on the pediatrics floor with you if a code blue went off?

A: No. The anesthesiologist certainly would be present, or could come to the floor.

Q: Yeah, but that's what I mean, they weren't there when it immediately happens, they have to get there, right?

A: Right.

Q: So who's the primary, who's the primary physician who's supposed to go immediately deal with the patient?

A: Well, you mean who would be running the code?

Q: Who would be the first person to get there?

A: Well, whoever, you know, ran the fastest or is the closest, and then, you know, whoever got there first **[Page 43]** typically would begin running the code.

Q: And maybe this will help a little bit, because this is where I'm a little confused. When you're at a hospital at night and you're on sort of this code team, that's not just for pediatrics, is that for the entire hospital, or is it just for pediatrics?

A: Well, I assume that all, you know, hospitals have their own code teams. The hospitals – and there is a different team for adult patients and for pediatric patients.

Q: Okay, so you would have been on the pediatric code team.

A: Yeah, thankfully.

Q: Thankfully, because kids don't have heart attacks as often. Is that why?

A: No. Because, I mean, kids are my specialty.

Q: Okay, so if there was a code blue with an adult, would you have to go?

A: No.

Q: You could choose to go if you wanted to, I take it?

A: I guess you could.

Q: You wouldn't.

A: No.

Q: You were busy with other things.

A: Right.

Q: Is that fair to say?

[Page 44]

A: Yes.

Q: And you knew someone else would be taking care of that.

A: Right.

Q: When you dealt with the patient, tell me the documents that you would fill out as a doctor.

A: There are many. There is, first of all, the history and physical exam form, where you fill out what their history was and their physical exam and then write an assessment and plan. There is the admitting orders, or the admission orders, where you would basically write the orders that the patient needs to have once they get to the floor. There is a medication reconciliation form, where you review with the patient what medicines they've come in on, rather, with the parent, what medications their child is on, to be sure you're all on the same page. If the child needs a monitor, you would fill out a monitor form. Those would be the main ones.

Q: Okay, and those forms, you'd fill them out yourself?

A: Yes.

Q: Which one of those – do any of those forms need to be cosigned by an attending?

A: The discharge to home. But you're talking about admission forms, right?

[Page 45]

Q: Well, I'm talking about all the forms you just talked about, whether any of those need to be cosigned by an attending.

A: None of those need to be cosigned by the attending.

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Q: Have you ever received a transcript from the University of Minnesota medical residency program?

A: Not that I'm aware of.

Q: You're presently a chief resident. Is that correct?

A: That's right.

Q: And you're a chief resident in pediatrics?

A: Yes.

Q: Why did you decide to become a chief resident?

A: Well, it had to do with my long-term goals, remaining academia, and emphasizing teaching and being involved that way.

Q: And how did your duties, how did your duties change from being a third-year resident to being a chief resident?

A: Well, as a chief resident, you have a lot more administrative duties. Your primary responsibilities are to run or help run the pediatric residency program. So as a chief resident, I do a lot of scheduling, handle **[Page 47]** complaints that come up amongst the residents, do a lot of teaching of the medical students and residents, and – those are my main responsibilities.

Q: And is it correct that as a chief resident, your primary job responsibility is not patient care?

A: That is correct.

Q: You mentioned complaints of residents.

A: Uh-huh.

Q: What do they complain to their chief about?

A: Mainly it's scheduling issues.

Q: And what does that mean?

A: That means that you're making a schedule for, you know, some odd 90 residents. A lot of people don't like, you know, when they have certain rotations or what nights they're on call.

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Q: Was there anything that you felt was a complex procedure in your first year of residency that did not seem complex in your second or third year?

A: Having done a number of procedures, specifically like lumbar punctures, during my first year, I felt like that procedure got easier my second year.

Q: And just for the record, what's a lumbar puncture?

A: Lumbar puncture is when a child is suspected of having meningitis, inserting a needle between L4 and L5 of the vertebrae into the spinal column to obtain some spinal fluid.

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Q: Your first year when you do that, I assume an attending was literally right next to you while doing it?

A: Yes.

Q: God, I hope so. How about, for example, in your third year, could you do a lumbar puncture without an attending next to you?

A: Yes.

Q: About how many in your third year, for example?

A: I don't recall exactly how many.

Q: To do a lumbar puncture, do you use local anesthesia?

A: Sometimes.

Q: Sometimes you don't use any?

A: Correct.

Q: What do you do to prevent the patient from being in severe pain?

A: So the ones where you wouldn't need to use lidocaine or a local anesthesia would be like a neonate, and in neonates, what you would do is give them, it's called Sweeties. It's just basically a sugary solution on a binky, and actually, that works quite well for anesthesia.

Q: But it's like a ten-year-old kid, you would use a **[Page 62]** local?

A: Yes.

Q: And how about your second year, did you start doing lumbar punctures without an attending literally looking over your shoulder?

A: I did a few as a second-year without an attending present.

Q: What was it that changed from you needing to have an attending with you to you not needing an attending with you?

A: Gaining competence and being in a role of supervision as a second-year. And let me add also that a lumbar puncture is not a difficult procedure, and it may sound horrible in that description, but it's actually a pretty, very routine procedure in pediatrics and, in fact, it may even be easier than starting an IV.

Q: Starting an IV, is that something you did as a resident?

A: Yes.

Q: Are there any procedures that are done by nurses or other persons that really have no educational value, so that the resident is freed up to do things with educational value? Thinking of drawing blood or something like that. Can you give me any examples of that?

A: Actually, I think that is a good example, drawing blood, starting IVs, you know. There are IV and blood-gathering **[Page 63]** teams within hospitals that then do free the residents up for more educational opportunities.

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Q: Do you watch ER?

A: I try not to.

Q: Because, just for the record, intubation is the big thing that once they can do it, everybody seems to have a big deal on the show. Is it that big of a deal to learn how to intubate?

A: An intubation is obviously a vital skill, you know, to be able to establish an airway. It is actually difficult. I think it's a more difficult procedure, and it's more **[Page 65]** difficult in pediatrics because you have different sized airways, you have to use different sized equipment, and there is always just a higher level of stress when you're dealing with a child than I think when you're dealing with an adult.

Q: The first time you did an intubation, I assume you did it with an attending next to you?

A: Actually, I believe there was an attending, a fellow, a resident, an RT, two RNs, and a couple med students, yes.

Q: Yeah.

A: There was a lot of people watching.

Q: And do you remember in your three years of residency when – well, during your three years of residency, did there become a time when you were able to do an intubation by yourself?

A: There was.

Q: Okay. When about did that take place?

A: In my third year.

Q: Third year?

A: Uh-huh.

Q: Okay, and is an intubation an example of a procedure that you've got to do it like right then when you see it, like they've got – do you understand the question?

A: Not really.

Q: There is certain procedures that you could plan in **[Page 66]** advance and do them a day later, right?

A: Uh-huh.

Q: Is an intubation typically something that you just come upon and say we've got to get an airflow and we've got to this done?

A: Uh-huh. It is a frequent emergency procedure, but there are times when you would intubate prophylactically, or if you expected that the child was going to go downhill.

Q: So when you were in your third year and able to do intubations on your own, were those in emergency situations?

A: I believe only one of my intubations as a third-year was in an emergency situation. The rest were fairly well-controlled situations.

Q: And during that third year, was that during the day or during the night, do you recall?

A: The one event, the one emergency?

Q: Yeah.

A: It was right in the morningtime, around 7:00 a.m.

Q: Does like a machine go off because the kid can't breathe, or how do you know?

A: Yeah. The child was on a monitor. This was in the neonatal intensive care unit, there was a monitor. The child's oxygen ratio was going down, heart rate went down, so the child was – all the monitors were going **[Page 67]** off, so.

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Q: Well, I guess – well, are you aware that there are some doctors who maybe have the opinion that residents don't really do much to help with taking care of patients? Have you ever heard that?

A: I've heard that.

Q: Based on your own experience, would you agree with that?

A: No.

Q: Why not?

A: I think every person that looks at a child gives another perspective and another opportunity to catch, you know, things that might have been missed. So I think it does contribute to the overall care of a patient.

Q: Have you ever had an instance when, as a resident, you caught something that the attending didn't catch?

A: Yes.

Q: And did you ever have a situation where you caught something the attending didn't catch and what you caught was significant in terms of the patient's care?

A: Yes.

Q: Can you give me an example of that?

A: Actually, and during, this was as an intern, spring of my intern year, there was a patient that came in to the **[Page 70]** emergency department who was a ten-month old with vomiting who was diagnosed with meningitis in the emergency department and sent up to the floor, and when I examined the child, she had a very diffusely-tender abdomen and didn't really look like a child that had meningitis. So instead, I thought she probably had a bowel obstruction, and did the necessary studies to evaluate that, and she did indeed have a bowel obstruction.

Q: If you hadn't caught the bowel obstruction, what could have happened to the patient?

A: Well, she could have developed an ischemic bowel, which then could have perforated and caused peritonitis or infection of the lining or the space in the stomach and around the stomach, and ultimately could have led to death.

Q: Are there any other examples that you can think of like that?

A: That's definitely the most dramatic example I can remember from residency.

Q: And when you caught this, was that during the day or during the night?

A: That was during the night.

Q: Because they had been admitted by the ER –

A: Right.

[Page 71]

Q: – doc. Okay. So in that instance, what did you do when you suspected it was a bowel obstruction?

A: So I called the surgery resident who was on call, informed them, and I called the radiologist, because they would be doing what's called a follow-through study. Basically they follow the dye through the bowel to see where the obstruction occurs.

Q: Did you have to call your attending?

A: Yes, I also informed the attending.

Q: Did you, did you call – did you decide to send the patient on to surgery before you had talked to the attending?

A: I don't remember the exact specifics. I think I'd spoken with the attending first, because – and then the attending was going to speak with the attending surgeon.

Q: If you're in the hospital in the middle of the night, as a resident, and someone comes in in a situation like this, where you realize that this is not a pediatric question, it has to go someplace else, can you simply move that patient to where they're supposed to go?

A: Not a pediatric issue.

Q: Well, what I mean is -- I don't know quite know how to term, but you yourself were not going to fix this bowel obstruction, correct?

A: Correct.

[Page 72]

Q: That would have to be done by a surgeon?

A: Right.

Q: So do you have to call the attending there or can you just say this kid needs to go someplace else?

A: You can make decisions if there is an emergency, but in this instance, and in the vast majority

of instances, you always contact your attending, especially if there is a significant change in the child.

Q: Do you think the services you provided to your patients were valuable?

A: Yes.

Q: Would you ever describe your services to your patients as modest?

A: Occasionally.

Q: On other occasions, would you use a different word or words?

A: Yeah. I mean, some patients you feel like you've contributed more to their care than others.

Q: Were you aware of anything called like a core curriculum?

A: Yes.

Q: What's that?

A: The core curriculum has to do with the ACGME requirements for what programs should have in their curriculum.

Q: Either in the hospital or at the clinics, did you ever have to work on billing issues?

[Page 73]

A: No.

Q: You didn't input codes or anything for –

A: No.

Q: – Medicare?

A: No.

Q: Nothing. When you were in your residency program, did you ever have to purchase any textbooks?

A: Did I ever have to purchase any textbooks?

Q: Like required reading?

A: There were no required readings, per se.

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Deposition of Emily Jordan (Dec. 13, 2007), Ex. 13 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

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[Page 7]

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Q: So how are transcripts generated for the medical residents?

A: That is not a customary request that's put into PeopleSoft for residents and fellows. The transcript function is typical of a regular University student.

Q: What do you mean it's not a customary request?

A: It's very unusual for anyone to want a transcript.

Q: Can you think of any reason anyone has ever asked for a transcript?

A: No.

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[Page 9]

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Q: Are you aware of whether or not the residents currently pay tuition?

A: No, they do not pay tuition.

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[Page 11]

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Q: How were persons informed of how to enroll a student, or excuse me, enroll a resident?

A: The program coordinators admit, enroll the students. Our residents do not do this themselves.

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[Page 13]

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Q: If you look at the transcript that you have in front of you there, ma'am, is that 139? I believe you will see that the course numbers remain the same –

A: Yes.

Q: – throughout different years of residency? Can you explain why that is?

A: Because of the broad scope of medical education, one number is assigned to a whole timeframe. So to go to very simple example, there are different course numbers on here. Not all departments have four course numbers. Pediatrics had one course number for their residents that they used for the entire three years we had them. The only thing that changed was the class number each semester, but it was always pediatric residency to cover their training. On this particular document, the internal medicine, they have four different identifiers that's consistent throughout their training. It covers a broad range of topics. It also covers multiple faculty, teach-

ing faculty. So it encompasses and brings this all **[Page 14]** together to identify it as particular topics in the training.

Q: Take a look at Government Exhibit 138, for example. Is this a document that's generated by the PeopleSoft system?

A: It's generated by UM Reports.

Q: Okay. What's the difference?

A: I'm not entirely sure of that. I would go to UM Reports, if I wanted to see this. I would not go to PeopleSoft.

Q: Taking a look at that document, let me reach across the table, for example, you see here there is Jonathan Isaac Radvin. Do you know who he is?

A: He's an instructor. He's teaching faculty.

Q: And you see here it says regular academic session. Do you see that?

A: Yes.

Q: 8:00 to 5:00, Monday through Friday.

A: Right.

Q: Do you see that? Room TBA. Do you see that?

A: Yes.

Q: TC East Bank. Do you see that?

A: Right.

Q: We have Brian Betts, who is an internal medicine resident?

A: Yes.

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Q: Do you know Mr. Betts?

A: I know his name.

Q: And on this document, on the last page, it's got a student count where it reaches to about 176. Do you see that?

A: Yes.

Q: Do you know whether there were 176 students who attended this class in the residency program?

A: I can't personally verify that, but that report tells me that there were 176 students registered for that class.

Q: In pediatrics, you were aware of the courses you were registering the medical residents for?

A: Yes.

Q: Okay. Did any of them have specific dates when a class was supposed to meet?

A: Reports were just like this, reports I pulled. To verify, after I went into the system to register each one, I would go to UM Reports, pull a report like this to verify everyone got in, that something didn't happen with the system, and I knew a count when I had everyone.

Q: But did you ever have a situation where you knew the count of the students and you knew a date and time for students, but an actual course number took place on those dates?

A: Yes.

[Page 16]

Q: And how can you explain that?

A: That's what their training is, that's when they're on the wards or in clinic situation. With pediatrics, we had the one board number that encompassed the entire training experience. So that's how we accounted for them being there every day.

Q: So if it said Twin Cities East Bank, it's possible they weren't physically on the Twin Cities East Bank.

A: Right.

Q: When you were a program coordinator in pediatrics, did you fill out this enrollment process you're talking about yourself?

A: Yes.

Q: Just a moment, I'd like to look at some documents from that period, or from that residency. Could you – do you have the documents there? Could you take a look at Exhibit 3? Taking a look at Exhibit 3, is this a document that's generated on the PeopleSoft system?

A: No. It's generated by UM Reports. Well, I'm sorry. I * * *

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Q: For example, Government Exhibit 138, do you see that? **[Page 20]** Yeah. Do you see where it says grade?

A: Yes.

Q: I'm showing you page 1.

A: Right.

Q: And they got an A. Page 2, everybody got an A?

A: Right.

Q: Page 3, everybody got an A?

A: Right.

Q: Page 4, everybody got an A; page 5, everybody got an A. Who's the instructor who decides what grade they get?

A: The teaching faculty. They could vary with each rotation.

Q: And on what document did the teaching faculty put down the letter grade?

A: They didn't necessarily work with a letter grade.

Q: Well, we have 176 As on this document.

A: Yes.

Q: So how does that come about?

A: May I just – the coordinator can be assigned as a proxy in PeopleSoft. PeopleSoft needed a grade for everyone, and you couldn't get past this, you needed to assign a grade. The grade would indicate that the person has successfully completed and met expectations. The real evaluation of the resident happened in another database. That's where the faculty went in and expressed their **[Page 21]** evaluation for performance.

Q: Would that be in the E*Value system?

A: Yes.

Q: Is it correct that currently, residents do not receive any letter grades?

A: I would say that the majority of them do not receive letter grades. I cannot think of an exception to that, not in PeopleSoft. No letter grades were being assigned, as far as I know.

Q: When you were in pediatrics as a coordinator, did a resident ever come in and complain about a grade.

A: No.

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Q: When tuition was suspended, did any residents object to that change?

A: No one spoke to me about an objection.

Q: Have you heard anything like that?

A: No.

Q: Do you deal with the resident agreements at all?

A: Yes, I do.

Q: Okay. Were the resident agreements changed in any way as a result of the suspension of tuition?

A: I don't have an answer for that.

Q: Let's take a look at a couple of them. Just take about a one-minute break. I'm not sure what the document number is. I think it's in the 60s.

MS. CARLSON: I think it is too. Sixty-seven is one.

MR. PAHL: Yeah, let's pull up, pull up Government Exhibit – now I lost it. I think it's 67.

MS. CARLSON: Take this one.

BY MR. PAHL:

Q: Pull up Government Exhibit, all right, Government Exhibit No. 67. Go ahead and take a look at that agreement. I'll have a few questions for you.

[Page 31]

MS. CARLSON: Do you want her to read the whole thing?

BY MR. PAHL:

Q: Well, actually, why don't you read the first paragraph under purpose. Do you see the second sentence of that paragraph that states, "During the time period in which residents/fellows are undergoing graduate medical education training at the University of Minnesota, they have the status of students?"

A: Yes.

Q: When tuition was suspended, is that sentence still true?

A: Yes.

Q: How so?

A: We didn't change that sentence. They're still considered students.

Q: Why are they still considered students if tuition is not paid?

A: They're in training. They're being taught about the medical education specialty that they want to practice in. The PeopleSoft system tracks their student career from beginning to end. They are identified as students through codes at the University, such as the code that the rec center utilizes to establish their status there.

Q: Anything else?

A: There is a benefit at the University that we offer to **[Page 32]** them, but we do not pay for, and it is my understanding that retirement accounts may be – employers contribute certain amounts in a retirement account and the employee would contribute amounts. We do not have that relationship with this

population. We do have two retirement accounts that are offered through the University of Minnesota benefits office. They are aware of this, they are told each year that they are in a program, that those accounts are there, but it is for them to participate in solely and entirely on their own. We have not established retirement accounts for them as an employer would.

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Deposition of Julie Cole (Nov. 29, 2007), Ex. 16 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

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[Page 21]

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Q: You said they put in a lot of hours their intern year?

A: They put in a lot of time, yeah.

Q: What do you mean by that?

A: They have more inpatient rotations in their intern year. They have about nine out of the 13 are inpatient rotations.

Q: Those would be ones in hospitals?

A: Yes, directly in hospitals.

Q: And in terms of a lot of hours, what's a number?

A: Well, for this current year, we have switched to a different call system that has been – I believe, I haven't seen the numbers just yet, but the intent to switch to a different call system was to reduce the hours to definitely above 40 to 60, but below 80.

Q: And the quarter that's issue in suit is the second quarter of 2005, which is April through June 2005. so when I'm asking you questions about the residency program, I'm trying to kind of keep it within the 2004-2005 year.

[Page 22]

A: Okay.

Q: Unless there is anything different, like something you just mentioned. So is that okay as we go through the questions?

A: Yes.

Q: Okay, fine. And anything you want, as I said, if there is anything you want to change about your previous responses, this is the time. If there was something different back in 2005, let me know.

A: Well, in 2005, we had a normal on-call schedule, where there was not a night float and the residents were working up to 80 hours a week, if not occasionally going over.

Q: Okay, and then you didn't have a night float, you said?

A: Let's see. No. Our first night float was tested on the farms in '06-07. So no, we did not at that time.

Q: How does the night float reduce the hours of the residents?

A: Well, there is no longer a shift that could be up to 30 hours. That shift does not exist anymore for the residents. There is somebody – the night float resident essentially comes in to cover the services at night, so those that are on call during the day can go home.

Q: Oh, so back in 2005, how would a resident do a 30-hour shift?

[Page 23]

A: Once every five days or once every four days, depending on their rotation. They would start at 7:00 a.m., they would go until 7:00 a.m. the next day.

Q: So 24 hours.

A: Twenty-four hours, and then there is sort of, the way I understood it, sort of a wrap-up period, where they were technically post-call and they were no longer able to see any new patients, but they needed to wrap up and sort of hand off their patients to the next call team in this post-call period, and that could last hopefully no more than six hours.

Q: So they would work 30 hours straight. How often in a week period?

A: Well, for the general medicine farms at the U, it was once every, once every four days; and then for the subspecialty services, it was once every five days.

Q: So once every four days. So then on the days that you weren't working the 30 hours, how many hours would they put in?

A: That varied by the service. So they're given one day off every seven days. So there is one day a week in seven that they have a day off. The other days, depending on how busy the service was, they could be working anywhere from sometimes they make it out a little bit early and only work a half a day. In most cases, they'd work at **[Page 24]** least eight to ten hours when they worked in the on-call slot.

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Q: Now, back in 2005, there was a – do you know anything about the tuition requirement?

A: I don't.

Q: You don't know whether or not the residents are required **[Page 25]** to pay tuition?

A: In 2005? I'm not sure.

Q: Do you know anything now?

A: No. I don't, I don't think I understand it.

Q: And I'm not asking you what you understand. I'm asking you what you know. Just tell me what you know.

A: I am not sure if they pay tuition. I understand that they no longer have student status, and that's why I'm not sure they pay tuition; and if they did pay tuition, that would probably go through their stipend, and I don't see the, I don't see what they receive.

Q: You mentioned student status. You were aware at one time that they had what you have called student status?

A: Officially, yes, they at one point did.

Q: What did that mean?

A: From a University perspective or mine?

Q: Let's start with the first one, from the University perspective.

MS. CARLSON: Objection, lack of foundation. You can answer if you know.

THE WITNESS: Well, honestly, I mean, I'm still confused about how, the official things that the University considers them as students. They're registered for classes. They have enough credits to be considered students. They receive student U cards. I'm **[Page 26]** not really sure.

BY MR. PAHL:

Q: Okay, and then go to the second part. You said on a personal basis.

A: On a personal basis, I believe they have student status.

Q: Okay. Why is that?

A: Because I believe their activities are educational. I believe their rotations can be likened to courses. I believe this is the necessary education they need to be able to become practicing physicians.

Q: You mentioned something about them being registered for courses.

A: Uh-huh, yes.

Q: What do you know about that?

A: Really, I register them every semester for four courses. I believe it totals up to I think 18 or 19 credits, and that's, I think that's about it.

Q: Okay. You physically do that?

A: Yes.

Q: Is it through a computer?

A: Yes.

Q: So tell me how you physically register residents for courses.

A: I log into the University's PeopleSoft system, and I create a class list for each course, and I essentially **[Page 27]** push a button and they're registered.

Q: Okay, and how many residents are there in internal medicine?

A: Total? There are 81.

Q: So are all 81 residents registered for the same class?

A: Yes.

Q: And what class is that?

A: Well, there are four different courses. Oh, I'm not sure of the exact names of them at the moment. I think one's called a pathology course. I don't have the exact name.

Q: Would it refresh your recollection if I said clinical medicine?

A: That sounds familiar. I'm not sure if that's the exact title, but it does sound familiar.

Q: And when you say there are four courses, why are there only four courses?

A: I think because of the changing rotations every four weeks, I think administratively, that would be an issue. I'm assuming that the titles of the four courses cover the year and the curriculum of the medicine residents.

Q: Okay, so I mean, when you say you register them for courses, do you have to do it, do you do it four times, because there is four courses?

A: Actually, I can create merged lists where I can create a course list and student list and I can just merge the **[Page 28]** lists, so I can essentially do it like all in one.

Q: Okay, so at some point, you can click a button and you have now registered 81 residents for four courses, correct?

A: Yes.

Q: And is that done before they start their residency or after?

A: That is actually done three times a year, every year.

Q: Okay. What are the three times of the year?

A: During the different, excuse me, the different registration periods at the University. There is a time in the spring when I need to register them for summer; by the end of summer, I need to have them registered for fall; and then by the winter, I need to register them for the spring semester.

Q: The four courses, does that ever vary?

A: Not that I've seen in the couple years I've been doing this.

Q: And when you register, let's take one course, is there an instructor listed?

A: The chair of our department, I believe, is the instructor that is listed.

Q: And this course you're referring to, might this course include medical students as well?

A: I am not aware of what the medical students are **[Page 29]** registered for.

Q: When your residents are registered for a course, all 81 of them, are all 81 of them required to go to someplace on the first day of that course?

A: They are always required to go to the first day of their rotation unless there is an excused absence.

Q: Right, but all 81 of them do not go to one central location, correct?

A: Correct.

Q: And all 81 of them do not meet with the person listed as the instructor. Is that correct too?

A: Not at that, not on the first day.

Q: Have you ever seen documents that the U generates for various courses that the residents are taking?

A: I don't believe so.

Q: Can you take a look at Government Exhibit 1. can you take a look at that?

A: Uh-huh.

Q: Do you recognize that?

A: I have not seen this listing before.

Q: Have you ever heard of a class called MED 7201?

A: Yes.

Q: Okay. What is that?

A: I believe that is a medical student rotation course.

Q: Okay. Take a look at Government Exhibit 1. Do you see **[Page 30]** like on the third line down, it says IMED residency?

A: Yes.

Q: Is that an abbreviation that you've ever used in internal medicine?

A: Yes.

Q: Do you have fellows in your program?

A: We do not.

Q: Have you ever registered your residents for a course known as MED 7201?

A: I don't – I'm not sure. I register them by the class number, and that changes every year, so the five-digit number.

Q: Okay.

A: I don't remember.

Q: Well, let's take a look at Government Exhibit 2. Okay?

A: Uh-huh.

Q: Have you ever seen anything like this?

A: I have not seen this list.

Q: Do you know of a course named MED 8201?

A: Possibly. It sounds familiar.

Q: Might that be one that you sign your residents up for?

A: Possibly, yes.

Q: Do you know a person named Jonathan Ravdin?

A: Yes. He's our chair, department chair.

Q: He's the chair of internal medicine?

[Page 31]

A: Yes.

Q: Do you know him on a personal – I mean, you work with him?

A: I do work with him, yes.

Q: You see there, it says regular academic session. Do you see that?

A: Yes.

Q: And it says 8:00 to 5:00 p.m. Do you see that?

A: Yes.

Q: Monday, Tuesday, Wednesday, Thursday, Friday. Do you see that?

A: Yes.

Q: Are you aware of whether Mr., or Dr. Ravdin, does he teach any classes where he is, you know, teaching from 8:00 to 5:00, Monday through Friday?

A: Do you mean that entire length of time?

Q: Yes.

A: There are brief times when he is an attending on services and has teaching responsibilities on those services. I don't know the hours that he teaches. He does also do other lectures that I'm not aware of the timeframe.

Q: The last page of this document, do you want to just turn to that. Down in the left-hand, first column, left-hand side, underneath didactic, it has a student count, and it says 176. Do you see that?

[Page 32]

A: Yes.

Q: Are you aware that Dr. Ravdin has any classes that he teaches where he has 176 students?

A: I am not aware.

* * *

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* * *

Q: Have you ever had a resident ask you for an official transcript?

A: No.

Q: Have you ever had anyone ask you for an official transcript?

A: Not a transcript in the way that this is created, no.

* * *

[Page 37]

Q: So did the 81 residents ever get in a room for this course known as clinical conference?

A: No.

Q: How about what is MED 8203, clinical radiology conference?

A: Similar to the past, the other two.

Q: Do all 81 residents ever get in one room for the course of clinical radiology conference?

A: No.

Q: And how about MED 8204, pathology conference?

A: Nope.

Q: Did you know what that is?

A: Similar to the other three. I can only just assume that it refers to their academic activities over the course of their year.

Q: And do all 81 residents ever get together with an instructor for a pathology conference?

A: No.

Q: And is it your understanding that – okay. Let's go down to the fall semester 2005. Do you see that?

A: Yes.

Q: Now we see MED 7201. Do you know why there is a different number for that year?

A: I am not sure why exactly, but I have – I do – yeah, I'm not able to speak on why that's different.

[Page 38]

Q: Now, you've had a chance to look at all of the entries in Government Exhibit 40. Is that correct? Take a look at it yourself.

A: Yes.

Q: Do you know why the medical residents appear to keep taking the same class, MED 7201, throughout their entire residency?

A: I'm not sure why.

Q: And is your answer the same for MED 7202, 7203, 7204?

A: Yes.

Q: No one ever came to you and talked to you about what the name of these courses are?

A: Nope.

Q: Who told you to register these people for these specific courses?

A: The Graduate Medical Education office.

Q: Who?

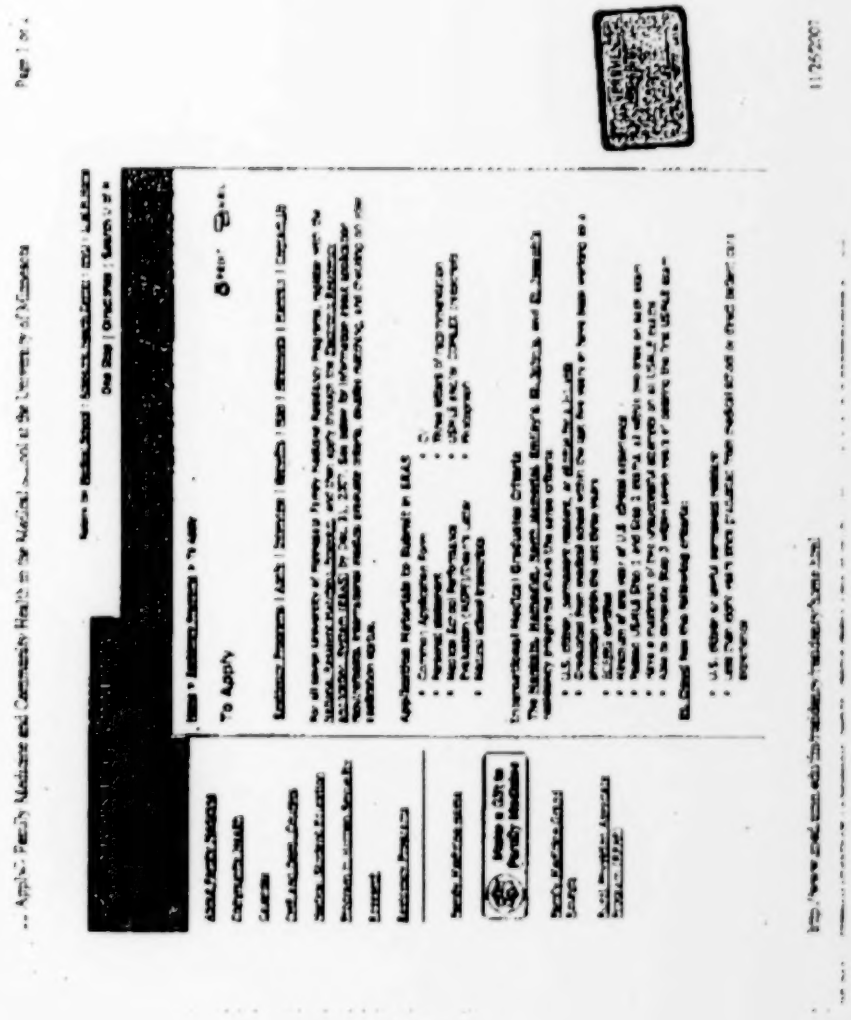
A: I believe at the time, it was Emily Jordan.

Q: Residents don't come to you and say this is what I want to register for, put this information in the computer. Is that fair?

A: Right, they do not.

* * *

Government Exhibit 49, Attachment to Deposition of Deanne St. George (Nov. 30, 2007), Ex. 17 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)



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Deposition of Peter Mitsch (Dec. 13, 2007), Ex. 18 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

* * *

[Page 16]

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Q: And can you ballpark the 2004-2005 medical resident tuition?

A: My recollection is that the tuition for medical residents at that time was about $1200, and student fees that they pay were a similar amount, 11, 12 hundred dollars, something like that.

Q: For the whole year?

A: For the whole year.

Q: Okay, so maybe 2500, ballpark?

A: Right.

Q: Can you explain the difference in the rate of tuition that's charged for medical students versus the rate that's charged for medical residents?

MS. CARLSON: Objection, lack of foundation.

THE WITNESS: I'm not sure – explain it in what terms?

BY MR. PAHL:

Q: Well, how about this: Do you know the factors that went into the decision that medical students should pay $18,000 a year, approximately, in the 2004-2005 year to attend the University of Minnesota?

A: Yes. There are a number of factors. There are budgetary considerations, as well as market conditions. So, for instance, we would not want to be the most expensive **[Page 17]** public medical school, and so we try to set our tuition to be competitive with other medical schools, and it's also a reflection of the costs that we incur to train medical students.

Q: And do you know what factors went into the decision that medical residents would pay approximately $2500 a year in the 2004-2005 period?

A: Yes. The thing to remember is in 2004-2005, we're dealing with incremental costs from the previous year, incremental charges from the previous year. So we don't step back and try to start fresh every year and say, okay, what should we charge the students. It's a decision on where we are at any point in time. So typically the tuition will increase, again, three, four, five percent from the previous year, and so that's basically the decision on any given year, is what percentage will we increase the tuition.

Q: You mentioned that for medical students, you look at the rates that are charged by other institutions?

A: Right.

Q: With medical residents, did you look to see whether any other institutions charge tuition for residents?

A: We did not look at that, no.

* * *

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Q: Does the University of Minnesota receive sufficient amount from the affiliated hospitals to cover the tuition for the residents?

A: Can you define sufficient for me?

Q: Well, the amounts that come in for tuition and fees from the affiliated hospitals, does that fully pay the tuition for the residents?

A: The residents pay their own tuition, meaning it's deducted from their stipend. So the residents are all paying their own tuition.

Q: So are any funds – well, when you bill the hospitals for a stipend rate, you bill the hospitals for a stipend rate that includes tuition and fees.

A: Correct.

Q: So when the hospital pays money to the University, that money has to include a proportion for tuition and fees.

A: Correct.

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Q: What is done with that proportion for tuition and fees?

MS. CARLSON: Objection, vague.

THE WITNESS: What is done with it by the University?

BY MR. PAHL:

Q: Right.

A: Well, what the hospital has done is reimburse the University for the stipend it pays the resident. So it's a direct reimbursement. The salary is charged to a department account, the payment comes in from the hospital, and it covers the salary.

Q: Well, the stipend that's charged to the hospitals, does the stipend itself include the tuition and fees?

A: The stipend, what the medical resident is paid, includes dollars that are then payroll deducted for tuition. So that's a stream of dollars for the medical school, is tuition revenue. What the hospitals pay us doesn't enter into the tuition mechanism. They're reimbursing us for the stipends of the residents, which is a cost that we incur through the payroll.

* * *

Government Exhibit 112, Ex. 19 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

SCHEDULE F

UMMS Resident / Fellow Stipend Levels
July 1, 2004 to June 30, 2005

The FTE's specified in Schedule A1-a of this addendum represents the resident and fellow FTE's that the parties anticipate will be trained by Regions Hospital during the period covered by this addendum ("Academic Year"). The parties acknowledge that certain elective or special rotations requested or initiated by a resident or fellow (each an "Elective Rotation" and collectively "Elective Rotations") may also occur during the Academic Year. The parties further acknowledge that neither party can anticipate the occurrence of Elective Rotations prior to the effective date of this addendum. Accordingly, Regions Hospital will incur the costs of any Elective Rotation of a resident fellow that occurs at a HP clinic in a non-Dentistry Department (as identified in Schedule A1-a) that had a Total FTE count of zero on the effective data of this addendum, if, and only if, the Elective Rotation is approved by the program director of both parties. The rates that Regions Hospital will pay for the approved Elective Rotations that occur during the Academic Year are set forth below.

	Annual Amounts							
PGY	Stipend	FICA	Tuition	Fees	Health Ins	Life Ins	Disab Ins	Total
1	40,545.00	3,101.69	1,347.00	1,767.00	2,862.00	21.00	163.72	49,807.41
2	41,584.00	3,181.18	1,347.00	1,767.00	2,862.00	21.00	163.72	50,925.90
3	43,330.00	3,314.75	1,347.00	1,767.00	2,862.00	21.00	163.72	52,805.47
4	45,107.00	3,450.30	1,347.00	1,767.00	2,862.00	21.00	163.72	54,713.02
5	46,833.00	3,582.72	1,347.00	1,767.00	2,862.00	21.00	163.72	56,576.44
6	48,478.00	3,708.57	1,347.00	1,767.00	2,862.00	21.00	163.72	58,347.29
7	50,028.00	3,827.14	1,347.00	1,767.00	2,862.00	21.00	163.72	60,015.86
8	51,629.00	3,949.62	1,347.00	1,767.00	2,862.00	21.00	163.72	61,739.34
9	53,282.00	4,076.07	1,347.00	1,767.00	2,862.00	21.00	163.72	63,518.79
10	48,478.00	3,708.57	1,347.00	1,767.00	2,862.00	21.00	163.72	58,347.29
11	50,028.00	3,827.14	1,347.00	1,767.00	2,862.00	21.00	163.72	60,015.86
12	51,629.00	3,949.62	1,347.00	1,767.00	2,862.00	21.00	163.72	61,739.34

GOVERNMENT EXHIBIT 112 Civ. 5069

LWJ 03854

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Government Exhibit 182, Ex. 19 to Declaration of Michael Pahl (Doc. 73) (Jan. 23, 2008), Attachment to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 2, 2008) (No. 08-2193)

HOLIDAY POLICY

Residents should verify any days off due to holidays with their rotation director and clinic site. Not all sites observe the same holidays.

LICENSURE POLICY

Residents are not required to have a Minnesota State License to participate in the residency program, although state law mandates that each resident have a Minnesota Residency Permit. This requires a one-time application and the permit is valid throughout the residency. The program will cover the one-time fee to process your application. Questions regarding licensure should be directed to:

Minnesota Board of Medical Practice
2829 University Avenue West, Suite 400
Minneapolis, MN 55414
612-617-2130.
www.bmp.state.mn.us/mn_home.htm

GRADED RESPONSIBILITY

It is the responsibility of the Internal Medicine Residency Program Director and the Internal Medicine Faculty to provide residents with direct patient care experience and progressive responsibility for patient management during their residency.

University of Minnesota Internal Medicine Residency Program Progressive Responsibility Policy Supervision

Internal Medicine Residency training in our program is designed to promote the professional growth and development of residents from novice physicians to highly skilled Internists. This occurs through the care of hundreds of individual patients, under the supervision of expert faculty. Residents acquire increasing responsibility designed by a sequence of rotations, and continuously adjusted to the needs of the resident and patients. It is our program's deeply held philosophy that physicians learn best when they are as autonomous as their knowledge, skills and attitude permit in the care of patients. That level of autonomy varies for each resident and each patient. Our faculty are ultimately responsible for patient welfare and safety, and therefore supervise all patient care encounters in the ambulatory and inpatient settings for all residents. Faculty are on call and available 24 hours a day and 7 days a week for supervision and consultation.

Performance Expectations and Standards for Interns

1. **Patient Care**

   Inpatient

   - Admit up to 5 patients per call night
   - Will not be assigned more than eight new patient admissions in a 48-hour period.
   - Will not be responsible for the ongoing care of more than 12 patients, when supervised by one junior or senior resident

- Write history and physical examinations, assessment and plan notes on all inpatient admissions
- Write daily progress notes on all of her/his own patients. All notes should reflect the changes in medical status and summarize test results and strategy for the next day. Notes must also be compliant with Medicare billing and documentation guidelines.
- Have sufficient knowledge of medical students' patients to provide sign-outs, and discuss with consultants in student's absence. Have a daily update on medical students' patients during team work rounds.
- Write all orders on her/his own patients
- Are NOT expected to perform admission H&P on Medical students' patients.
- Will admit no fewer than 210 patients during internship

Ambulatory Medicine

- Able to see up to 5 patients per half-day in continuity clinic
- Provide appropriate follow up care for patients in continuity clinics
- Write or dictate notes on all patients

2. **Medical Knowledge**

Inpatient Care

- Interns are expected to demonstrate full command of the details of clinical care on all of their patients, including complete history; physical examination; diagnostic test results; and consultant recommendations.

- **Cross-coverage:** Interns are expected to provide clinical assessment and care of internal medicine patients on the inpatient teaching service when on overnight call. Patient assessment must include sufficient understanding of the patient to provide temporary care of the patient, until the primary resident or team returns to the hospital the next morning.
- **Interns on the impatient teams** are expected to provide an initial assessment of their patients' medical conditions, and to initiate diagnostic and management plans after consultation with the supervising resident. **After 4 months** of medicine internship, interns are also expected to independently initiate diagnostic and therapeutic plans on their patients, including cross-coverage patients, with advice from supervising residents as needed.
- Interns are **not** expected to obtain consent for autopsy. This is a supervising residents' responsibility
- Interns should attend and actively participate in morning report, core conferences and seminars

Ambulatory Care

Interns are expected to be able to evaluate and manage 4-5 patients per half day clinic, under the supervision of their faculty. Interns are expected to demonstrate complete understanding of the details of care on all of their patients, including history; diagnostic test results; and consultant recommendations. Interns are expected to provide an initial assessment of their patients' medical conditions, and to initiate

diagnostic and management plans after consultation with the supervising faculty. **By the 7th month** of internship, interns are expected to independently initiate diagnostic and therapeutic plans on their patients, with advice from supervising residents as necessary.

3. Teaching and Academics

- All residents are expected to teach each other and the medical students assigned to their teams. Interns are expected to share insights into physical examination, history, pathophysiology, basic procedures and any aspect of patient care with their medical students.
- On inpatient teams, it is desirable that Interns provide presentations to their team on medical topics related to any aspect of the care of their patients, at least twice per month on every inpatient rotation. This presentation should be based upon a question raised during the care of patients, should provide references, and if possible, should comment on the quality of the evidence from references.
- Attend *Transition to Residency Workshop* in June
- **Optional (but encouraged):** Prepare a clinical vignette for the annual Minnesota ACP meeting

4. Professionalism

- Interns are expected to attend at least 60% of core conferences, intern morning reports, morbidity and mortality conferences (or clinical pathologic conferences) and grand rounds.

Interns are not required to attend Residents' morning report, but are welcome if they re available

5. **Communications and Interpersonal Skills***
6. **Practice-based learning and improvement***
7. **Systems-based medical practice***

(* See Core Competencies in table below)

PGY-1

By the end of the year, the intern . . .

- ☐ Recognizes when a patient is acutely ill and in need of urgent medical attention.
- ☐ Make appropriate assessment, and institute a reasonable plan of management
- ☐ Maintains comprehensive, timely, legible and appropriately detailed medical records
- ☐ Demonstrates efficiency and organization in the care of patients
- ☐ Shows compassionate and effective communications with patients, families and health care team
- ☐ Is ready to lead an inpatient team, including supervising a new intern and medical student, with the help and oversight of an attending physician

Performance Expectations for PGY-2 Residents

1. **Patient Care**

Inpatient PGY-2 Residents . . .

- Admit up to 8 new patients per call night.

- Will not be assigned more than 8 new patient admissions in a 48-hour period.
- Will not be responsible for the ongoing care of more than 16 patients, including the interns' patients
- Perform a directed history and physical examination on all patients admitted by the interns supervised.
- Perform a complete history and physical examination on all patients admitted by the medical students supervised.
- Reviews management of all of the supervised interns' patients
- Write or dictate a brief admission note on the interns' patients to clarify and correct the quality and documentation of the admission note.
- Write or dictate an admission note and daily progress notes for all of supervised medical students' patients
- Cosign all medical student progress notes and orders.
- Supervise sign-outs of medical student patients
- Review sign-outs on complicated patients with the on-call junior or senior resident
- Obtain consent for autopsy.

Ambulatory/Consultation The PGY-2 Residents . . .

- Are able to see up to 6 patients per half day in clinic
- Provide follow up care for patients in continuity clinics

- Write or dictate notes on all patients.
- Can elect to take 2 half-day clinics per week

2. Medical Knowledge

Inpatients

- PGY-2 residents are expected to demonstrate comprehensive understanding of all patients under their care, including history, physical examination, diagnostic test results; and consultant recommendations. PGY-2 residents will have limited supervisory value in critical are rotations until the 2nd half of the year.
- Residents are expected to provide advice to interns on call. Residents are also expected to provide emergency and urgent consultation for non-medicine services, including, but not limited to management of cardiac and respiratory resuscitation.
- Supervising residents on inpatient teams are expected to critique and extend their intern's assessment of patients, and diagnostic and management plan, and to consult with the attending physician as dilemmas arise. In addition, they are expected to provide primary and secondary references for their teams that address clinical questions or knowledge gaps in patient care.

Ambulatory/Consultative Medicine

- Development of Ambulatory Medicine knowledge and skills, through required rotations in Adult Health Care (AHCC (2 months), Ambulatory Skills (1 month) and 4 elective rotations.
- All residents are expected to regularly read the major Internal Medicine journals, includ-

ing, but not restricted to Annals of Internal Medicine, NEJM, JAMA.

3. **Teaching and Academics**

- All residents are expected to teach each other and the medical students assigned to their teams. Supervising residents have a responsibility to directly supervise medical students on their team (see Patient Care, above). Residents are expected to review the students' histories and physical examinations for accuracy of performance and interpretation of results. This includes demonstration and correction of techniques for both skill sets. Residents are also expected to critique students' oral presentations and chart notes for format, content, and adequacy of documentation.
- On inpatient teams, it is desirable that Residents make presentations to their team on medical topics related to any aspect of the care of their patients, at least once per week on every inpatient rotation. The supervising resident, in collaboration with the attending physician is responsible for assigning interns and medical students to prepare talks, (vide supra, interns). These presentations should be based upon a question raised during the care and discussion of patients, should provide references, and if possible, should include the quality of the evidence from references.
- On all rotations, residents are expected to provide primary and secondary references to the requesting team.

- Participate in Resident Teaching Improvement Program (RTIPS)
- Residents who seek a career in subspecialty or academic medicine are encouraged to take a research elective for up to three months.
- Optional but encouraged:
    - o Presenting the results of research done during the senior or PGY-2 year at the annual Minnesota ACP meeting in November.
    - o Preparing a clinical vignette for the annual Minnesota ACP meeting in November.

4. Professionalism

- PGY-2 residents who seek a career in subspecialty or academic medicine are encouraged to take a Residents are expected to attend at least 60% of core conferences, intern morning reports, morbidity and mortality conferences (or clinical pathologic conferences) and grand rounds. Exceptions include AHCC rotation and international or rural rotations.
- Residents are the leaders of their inpatient teams. As such, they are expected to manage the conduct and timeliness of the team's work rounds, prepare the team for attending rounds, and ensure that the team members are able to attend conferences. This requires close consultation and collaboration with the attending physician.
- Attend Professionalism Workshop

5. **Communications and Interpersonal Skills***
6. **Practice-based learning and improvement***
7. **Systems-based medical practice***

(* See Core Competencies in table below)

PGY-2

By the end of the year, the resident . . .

- ☐ Independently assesses and initiates management of very ill inpatients and all outpatients
- ☐ Shows insight and judgment in most clinical situations
- ☐ Recognizes and manages most new clinical situations skillfully
- ☐ Models compassionate and effective communications with patients, families and health care team and
- ☐ Demonstrates continuous improvement in patient care, through analysis of own practice and performance, including use of chart and discharge summary review
- ☐ Seeks appropriate learning resources and consultation

Performance Expectations for PGY-3 and 4 "Senior" Residents

The PGY-3 (and MP 4) years are designed to provide trainees with opportunities to take a variety of elective rotations in subspecialty and general medicine, as dictated by the individual resident's learning needs and career goals. This requires residents to reflect upon their strengths and areas for improve-

ment, with help of feedback form their advisor, faculty mentors, and the Medicine In-Training Examination results, and is based upon the premise that all residents' training is to become a complete Internist, no matter their final career plans. Effective July 1, 2003, all residents must have clinical experience in each of the subspecialties in Internal Medicine. This may occur in either inpatient or ambulatory setting. The subspecialties include: cardiology, critical care, endocrinology, gastroenterology, geriatric medicine, hematology, infectious diseases, nephrology, oncology, pulmonary disease, and rheumatology.

The final year(s) of training is also a time to polish and develop teaching, scholarly, and systems-based medical practice skills in preparation for independent practice of medicine or fellowship. The curriculum provides a platform for achievement of these goals by providing 7 months of elective rotations, and 5 months of inpatient rotations.

The expectations for performance of PGY-3 is as described for PGY-2 residents with the following additions:

Patient Care and Medical Knowledge

Inpatient assignments

- With few exceptions, during the first 6 months of the academic year, every senior resident will serve as supervising resident on the following teams:
    - FUMC Critical Care
    - FUMC Cardiology
    - VAMC Cardiology

Teaching and Academics

Senior residents are expected to expand their roles and responsibilities as teachers in scope and frequency by the following:

- Present Journal Club a least once during the academic year
- Present a Senior Talk during the last 3 months of residency. (See descriptions in Written Curriculum)
- Actively participate in RTIPS
- Facilitate workshops for residents on Physical Diagnosis and Professionalism. Present the results of research done during the senior or PGY-2 year at the annual Minnesota ACP meeting in November.
- Prepare a clinical vignette for the annual Minnesota ACP meeting in November.
- Attend Teaching Workshop: Preparation of a scholarly presentation

Leadership and Professionalism

- Attend Professionalism Workshop

5. **Communications and Interpersonal Skills***
6. **Practice-based learning and improvement***
7. **Systems-based medical practice***

(* See Core Competencies in table below)

PGY-3

By the end of the year, the PGY-3 resident . . .

- ☐ Practices as an independent physician
- ☐ Effectively evaluates the performance junior residents and medical students

- ☐ Demonstrates exceptional knowledge of basic and clinical sciences
- ☐ Demonstrates comprehensive understanding of complex relationships and mechanisms of disease
- ☐ Incorporates teaching into practice: medical students, interns, and colleagues
- ☐ Uses evidence from scientific studies to improve patient care
- ☐ Understands the limits of her/his knowledge and seeks appropriate learning resources and consultation
- ☐ Models "Reflective Practice": the continuous assessment of personal an systems' performance to improve patient care

Deposition of Dr. Bradley Benson (Nov. 8, 2007), Ex. 3 to Supplemental Affidavit of Kristina W. Carlson in Support of Motion for Summary Judgment (Doc. 65) (Jan. 7, 2008), Attachment to Brief of Univ. of Minn., *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 26, 2008) (No. 08-2193)

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Q: The courses that the residents currently take, are they all rotations, using the definition I used before, placement in a hospital, or are there some courses that are didactic?

A: There are – as I know now, we always update curricular offerings. There have always been research rotations, in which someone can do a research project, and it does not, you know, it has nothing to do with patient care, in a hands-on in the exam room or at the bedside type of way. Those have always been done, always been offered.

Scholarly projects have been offered. A person can spend a block period of time pursuing a scholarly project that would enhance their education and contribute something.

There is now a global health course, which is a two-month, or an eight-week course offering that learners can take, students and residents. And I should probably clarify. A student I would denote as someone who has not yet finished medical school. A resident is a learner who is now in there, has decided what they want to eventually be and is enrolled in a residency training program. And both of those types

of learners are able to enroll in the global health course, and they can take one four-week block in one year, the other four-week block in **[Page 29]** the other year.

And then there are also off-site rotations, such as international or global health experiences, where a learner will go, and that's available in medical school or the residency programs, where they'll go and spend a block period of time learning in another country.

So those are the other types of learning experiences, other than the rotations, courses, whatever we, you know, commonly agree upon is the learning experience that most residents spend the majority of their time doing.

Q: Okay, and is it correct that you have 13 blocks of residency rotations in a year?

A: Per – yes.

Q: And those are four weeks each?

A: Yes.

Q: And I guess there is a month of vacation built in, that's how you get the full year. Is that correct?

A: So there is, there is four weeks that can be taken in any combination of sick leave and vacation per year and not have to make up time per ACGME guidelines. We offer three weeks of vacation and a week of personal leave each year, and it's spread out across the time. So a four-week period could include three weeks of the rotation and a week of vacation or personal leave.

[Page 30]

Q: So, for example, in the first year of residency, of the 12 courses that a resident is required –

A: And it would be 13.

Q: Of the 13 courses a resident is required to take, how many of them would be didactic in the sense of no placement in a hospital or clinical setting?

A: In the first year, all of the typical, in a typical schedule, for one of my first-year residents, the learning experiences would all be clinical.

Q: Okay. How about the second year?

A: In the second year, there is the possibility to do some of the other offerings. When you look at specifically the educational requirements for med-peeds, there is less nonclinical time, but again, one of the things that I believe as an educator is we need to design the educational experiences to aid in the outcome. So if we want a learner to learn clinical medicine setting, just as if we want a pilot to learn how to fly a plane, we don't have them sit in a lecture hall and look at books and read books on flying planes. We tailor their educational experiences to include actual in-plane experience.

Also, traditional medical school is that way, in which the first two years, now this is all being turned on its head as educational theory advances, and we **[Page 31]** put clinical experiences earlier and earlier into those first two years of medical school. But as you know, the third and fourth years of medical school are generally all clinical experiences, in which they do rotations or courses, however you want to call them, in hospital settings and clinical settings.

* * *

Government Exhibit 32, Attachment to Deposition of Dr. Bradley Benson (Nov. 8, 2007), Ex. 3 to Supplemental Affidavit of Kristina W. Carlson in Support of Motion for Summary Judgment (Doc. 65) (Jan. 7, 2008), Attachment to Brief of Univ. of Minn., *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 26, 2008) (No. 08-2193)

UNIVERSITY OF MINNESOTA

2004-2005
RESIDENT AND
FELLOW
INFORMATION:

Policies, Guidelines
and Reference Listings
PART B MANUAL

Department of Pediatrics

* * *

Please see the Resident Ward Guide for specific information related to accessing and utilizing these services and systems at all sites affiliated with the pediatric residency program.

SECURITY/SAFETY

Security measures are provided at all locations involved with the residency program including escort service for parking facilities as well as a secure environment in the hospital, call rooms, and other clinical facilities.

V. PROGRAM REQUIREMENTS/ CURRICULUM

CERTIFICATION IN PEDIATRIC ADVANCED LIFE SUPPORT (PALS)/NEONATAL RESUSCITATION (NRP)

The department will provide courses in PALS and NRP leading to provider certification. Each PL-1 shall complete these courses and obtain certification prior to advancement to the PL-2 year. All expenses shall be covered by the Department PL-1 certification in PALS and NRP. Interns and residents who fail to attend a scheduled PALS/NRP course will forfeit the cost of the course(s) from their educational allowance account. Those residents who wish to re-certify, may do so using money from their educational allowance or at their own expense. The program does not mandate re-certification after two years.

DUTY HOURS AND ON-CALL REQUIREMENTS

Please refer to Part A first for Medical School Policy. The policy of the ACGME for on-call requirements is adhered to strictly.

The University of Minnesota Pediatric Residency and Fellowship Programs support a learning environment that assures safe patient care and appropriate learning opportunities. We recognize that residents provide the safest and most effective patient care, learning, and adherence to the ACGME requirements the following minimum standards are provided in our program.

- Duty hours are defined as all clinical and academic activities related to the training program including patient care, administrative duties related to patient care, time spent in-house during call activities, and scheduled academic activities such as conferences.
- Rotations are monitored to assure that residents are limited to 80 duty hours per week, averaged over a four-week period.
- Residents are limited to a 24 hour time period of on-call duty with no new patients accepted after this time period. Residents may remain on duty for up to 6 additional hours for continuity and transfer of care and to participate in educational activities.
- Post-call continuity clinics will be cancelled with the option for residents to schedule an alternative clinic to replace the cancelled clinic. It is the resident's responsibility to communicate cancellation of post-call clinics.
- Residents are provided at least 1 day in seven free of patient care responsibilities, averaged over a four-week period.
- Call is no more frequent than every third night.
- Residents are provided a minimum of a 10-hour test period between duty hours.
- When on call from home, time spent in the hospital will be counted toward the weekly duty hour limit.
- Residents are scheduled a maximum of 4 call months in a row followed by an ambulatory rotation with minimal to no call or an emergency medicine rotation that averages 40 – 44 hours/week. Though not identified in the new ACGME requirements, we believe this also helps minimize chronic fatigue.

- While assuring appropriate work hours the program will promote the importance of patient care responsibility to assure smooth transitions and optimal cross coverage when patient care is transferred over to the on-call team.
- These requirements will be monitored, including a formal review every 6 months of average work hours per week and when residents leave post-call. Information will be obtained from parking for accuracy of data and will be reviewed every June/July and January/February to factor in both the seasonal component of pediatrics and the effect of increasing skill level throughout the year.
- Recognizing that learning when post-call is suboptimal and that the program has a core curriculum that is repeated annually, post call residents are excused from noon conference though encouraged to attend.

MONITORING OF RESIDENT WELL-BEING

The process of assessing resident performance includes monitoring of resident well being and assuring a supportive work environment that does not allow excessive service resulting in undesirable stress on residents. The program director will monitor for any mental, emotional or drug/alcohol related conditions inhibiting performance or learning and ensure appropriate intervention in a confidential manner. Situations that demand excessive service or that consistently produce undesirable stress on residents will be evaluated and modified. The program director and faculty recognize the need for timely provision of confidential counseling and psychological support services to residents. If a resident is experiencing excessive fatigue or stress, especially if affect-

ing the resident's ability to provide safe patient care, the resident should contact a chief resident or the program director as well as utilize the Resident Assistance Program (RAP). RAP is a free and confidential service available anytime to all residents and immediate family members. The program is confidential and designed to be flexible to accommodate a resident's busy schedule. The contact number is (651) 430-3383 or 1 (800) 632-7643.

RESIDENT GRADED RESPONSIBILITIES

PL-1 Responsibilities

Pre-rounding – Arrive in the morning to have enough time to:

- Obtain sign-outs on your patients from the previous evenings call team.
- Collect and review all data from the previous twenty-four (24) hours (i.e., vitals, I/O's, labs).
- **All this should be done prior to rounds.**

Rounds

- Present each patient in an organized, problem-oriented fashion, including assessment.
- Formulate plans for each problem.
- Develop system ("To Do List") to document plans decided and to be carried out that day.
- Write orders of the day promptly and discuss these with nursing and patient's family.

Day

- Follow through on plan from rounds.
- Reassess patients as needed.
- Discuss final plans or unanticipated changes with the senior resident.

- Perform ward admissions as assigned with orders done promptly.
- Each new patient should have a complete H&P with differential and plan on the chart in a timely manner.
- Prepare sign-outs for the on-call team with pertinent details regarding medications, allergies, anticipated abs and tests AND what the plan is for those results.
- Maintain appropriate presence on the ward. Communicate if leaving the ward to senior resident or colleague

On-Call

- Attend sign-out rounds.
- Follow through on sign-out plans and determine which patients require a baseline exam and reassessment later in the evening.
- Communicate with on-call senior resident about questions/problems.
- Assure communication with the charge nurse.
- Discuss all admissions with your senior resident, even if plan already reviewed with the staff or fellow.
- Communicate overnight events with the interns/seniors in morning.
- Answer all pages PROMPTLY

Miscellaneous

- Foster a professional demeanor in all situations.
- Respect ancillary personnel in the spirit of teamwork.
- Attend didactic sessions and conferences-these are vital to your education!

- All dictation's and paperwork should be completed before leaving a service.
- If you are going to be absent from or late arriving you MUST inform the chief resident and your senior resident.
- There are no discreet start/end times to the workday. You are expected to arrive in time to obtain information on your patients and complete your work before signing out and/or leaving for the day.
- Demonstrate ability to quickly assess, prioritize and triage multiple patients' needs.
- An important concept in the healthcare is teamwork. Residents are expected to assist each other to complete tasks when the need arises.

Senior Resident Responsibilities

In addition to responsibilities outlined above, the following information outlines expectations for senior residents, as part of the increase in responsibility during residency. This is NOT meant to be an all-inclusive list but rather general expectations from which to work.

Patient Care

- See new admissions in a timely manner.
- If unable to see a direct admission (i.e. patients not first seen in the ER) in a timely manner, contact the fellow or attending on call to assure adequate supervision for the intern.
- See and examine all patients daily.
- Check all medical student orders and doses. Co-sign all student orders in a timely fashion.
- Ensure that all plans made during rounds have been carried out.

- Assure that patient care plans are communicated to nursing.
- Anticipate patient discharge and assure that all plans are in place the night before discharge.
- Discuss any significant changes in patient status or plans with the fellow and/or attending.
- Prepare complete sign-outs on all patients for the on-call team with pertinent details regarding medications, allergies, anticipated tests, and what the plan is for those results.
- Ensure that all patient exams, notes, orders and discharges have been completed for signing out.
- Read and co-sign all student H&Ps and notes. Review intern H&Ps and notes periodically as needed. Any errors or omissions should be corrected in a timely fashion.

Team Leadership/Teaching

- Assume an active role with weekly teaching. Remember that teaching occurs in many settings; at the bedside, "pearls" given when discussing admissions and during daily rounds, scheduled topics by any member of the team, and most importantly by example.
- Distribute patients/admissions among students and interns fairly.
- Enable team members to attend educational activities; set an example by your own attendance.
- Assist students and interns in pre rounding and preparing data and presentation for rounds.
- Create a team environment in which students and interns feel comfortable raising questions and concerns.

- Demonstrate that you are readily available through visibility on the wards as well as by touching base with your team members as warranted.
- Foster a professional demeanor in all situations.

SUPERVISION OF RESIDENTS

All patient care is supervised by qualified faculty. The Resident Responsibility guidelines outlined above are communicated to all members of the program staff. Residents are provided with prompt, reliable systems for communication and interaction with supervising faculty. On-call schedules for teaching staff are structured to ensure that supervision is readily available to residents on duty.

Residents are supervised by teaching staff in a way that will allow progressively increasing responsibility for patient care according to level of training, ability and experience. The level of responsibility accorded to each resident is determined and monitored by the teaching staff.

ROTATION SCHEDULING

A. PL-1 Scheduling

* * *

Government Exhibit 35, Attachment to Deposition of Dr. Brian Betts (Nov. 8, 2007), Ex. 4 to Supplemental Affidavit of Kristina W. Carlson in Support of Motion for Summary Judgment (Doc. 65) (Jan. 7, 2008), Attachment to Brief of Univ. of Minn., *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 26, 2008) (No. 08-2193)

* * *

Internal Medicine Residence

Benefits

2004-2005 Stipends
PGY-1: $40,545: PGY-2: $41,584: PGY-3: $43,330

Residents who obtain a Minnesota license can take advantage of moonlighting opportunities within the program to earn as much as an additional $20,000 or more per year. Minnesota licensure is available to physicians who have satisfactorily completed the PGY-1 year of training. Moonlighting is not available to trainees on a J-1 visa.

Educational Allowance
$600 per year

PDA
A complimentary Palm Zire 72 featuring a digital camera and medical software is provided to all residents.

Additional Benefits
4 weeks paid vacation in PGY-1 year; 3 weeks

in each subsequent year
Health insurance – single and family coverage (shared cost)
Dental insurance – optional, but available
Benefits available to same sex partners
Life insurance - $25,000 term life policy – University pays full cost
Long-Term disability insurance – University pays full cost
Short-Term disability insurance – University pays full cost
Professional Liability Insurance – University pays full cost
Pre-tax reimbursement accounts for dependent and/or health care costs
Paid sick leave
Paid maternity (6 weeks) and paternity (2 weeks) leave
Child care centers at University and VA Medical Centers
5 days educational leave for CME conferences and other approved activities
ACP Membership for residents presenting a poster at the Regional Conference
ACLS Certification
Meal tickets while on ward/ICU rotations
Free parking at all sites
Scrubs and embroidered white coats
University of Minnesota-affiliated site business cards

* * *

Deposition of Fairview (Dr. Gordon Alexander) (Dec. 11, 2007), Ex. 7 to Supplemental Affidavit of Kristina W. Carlson in Support of Motion for Summary Judgment (Doc. 65) (Jan. 7, 2008), Attachment to Brief of Univ. of Minn., *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 26, 2008) (No. 08-2193)

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* * *

Q: Do you see where it says, "The Staff Surgeon is present in the Operating Room during the critical portion of the procedure?"

A: Yes.

Q: Do you know what that means?

A: Yes.

Q: Can you give me an example?

A: If you're doing a cholecystectomy, which is removal of the gallbladder, when it comes time to remove the **[Page 109]** gallbladder, as opposed to opening the patient and exposing the gallbladder, or having the gallbladder out and closing, okay, so when it comes to the critical portion of the cholecystectomy, that would be removing the gallbladder, the attending surgeon needs to be the staff surgeon.

Q: Everything else could be done by residents, correct?

A: I wouldn't say everything, but other things might be done by a resident or a surgical technician or a physician's assistant. I mean, there is a number

of other categories of people who have the skill to do those sorts of things.

* * *

Deposition of Dr. Angela House (Nov. 29, 2007), Ex. 10 to Supplemental Affidavit of Kristina W. Carlson in Support of Motion for Summary Judgment (Doc. 65) (Jan. 7, 2008), Attachment to Brief of Univ. of Minn., *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 26, 2008) (No. 08-2193)

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* * *

Q: When you were a medical student, did you have one of those lab coats with the M on it?

A: My lab coat did not have an M on it.

Q: Do you know why that is?

A: I think they just hadn't started embroidering them or something at that point.

Q: Okay. I was told last night that if you're at the **[Page 21]** U of M Med School, you have the M on it.

A: They have a label on them, yes.

Q: And when you're a resident, you don't have the M. Is that correct?

A: The lab coat says my name on it. I don't recall what else it says. I don't think it says anything else.

Q: And is it correct that when you were a medical student, you wore a short lab coat?

A: Yes.

Q: And when you're a resident, you wear a long lab coat?

A: Yes.

Q: And the lab coat you wear as a resident is the same lab coat that the attending wears, correct?

A: Yes.

Q: It's the same lab coat as a physician's assistant wears, correct?

A: Yes.

Q: And so the only persons who wear the short lab coats are students, correct?

A: The only ones who don't wear long lab coats are medical students.

* * *

Deposition of Dr. Louis Ling (Dec. 14, 2007), Ex. 12 to Supplemental Affidavit of Kristina W. Carlson in Support of Motion for Summary Judgment (Doc. 65) (Jan. 7, 2008), Attachment to Brief of Univ. of Minn., *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 26, 2008) (No. 08-2193)

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* * *

Q: Drawing blood?

A: Well, we generally have asked residents not to draw blood, and the main reason is because when people go into [74] practice, that's not one of their activities. So it's really changed. That's not really a physician function anymore.

* * *

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* * *

Q: Do residents perform procedures after they've done the minimum ACGME required amount?

A: Well, I don't know. I mean, it looks like they do, because for paracentesis, this one has done four.

Q: Do you know why they would do that?

A: I don't know why.

* * *

Affidavit of Peter J. Mitsch (Dec. 26, 2007), Ex. 24 to Supplemental Affidavit of Kristina W. Carlson in Support of Motion for Summary Judgment (Doc. 65) (Jan. 7, 2008), Attachment to Brief of Univ. of Minn., *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 26, 2008) (No. 08-2193)

* * *

1. I am currently employed by the University of Minnesota ("University") as Associate Dean of Finance and Administration at the Medical School. I have had various titles at the University, but have had the same job responsibilities as I do in my current position since 1997. Those job responsibilities include responsibility for overseeing finances and budgeting for the various departments in the Medical School.

2. I submit this Affidavit in connection with the University's Memorandum of Law in Support of Summary Judgment.

3. The funds the University receives from affiliated hospitals to help cover its medical residents' stipends and the FICA expenses related to those medical residents only covers the time residents spend at certain hospital sites. It does not cover the residents' stipends nor the associated FICA expense for the time residents spend on certain research rotations, on certain clinical rotations for which there is no reimbursement to the University, or certain resident leaves of absence. These amounts are paid by the University with no reimbursement; in 2005, they cost the University approximately $5.5 million.

4. In addition, the University also ultimately bears part of both the FICA expense and residents' stipends for residents rotating at Fairview. When

the University sold the former University Hospital to Fairview in 1997, the parties agreed to share the expense of medical education and research occurring on-site at Fairview. The parties created the Medical Education and Research Task Force and hired a consultant, Ernst & Young LLP, to develop an accounting methodology that identified, traced and measured education and research expenses and revenues on the consolidated Fairview-University Medical Center campus relating to medical residents, fellows, medical students, and students in allied health, pharmacy and nursing. This accounting of expenses and revenues is known as "the Bucket." The University is responsible for half of the Bucket expenses to the extent those expenses are not offset by medical education-related revenues at Fairview. Since the FICA tax and resident stipends are both medical education-related expenses, they are included in the Bucket. Each year since the parties began using the Bucket accounting, there has been a deficit. Typically, the University pays Fairview approximately $8 million annually for its share of the Bucket deficit, a portion of which is attributable to its residents' stipends and the cost of the employer's share of the FICA tax on those stipends.

* * *

Affidavit of H. Mead Cavert (June 25, 1992), Ex. 27 to Supplemental Affidavit of Kristina W. Carlson in Support of Motion for Summary Judgment (Doc. 65) (Jan. 7, 2008), Attachment to Brief of Univ. of Minn., *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 26, 2008) (No. 08-2193)

* * *

6. At the University, many residents in clinical fields undertake research assignments, prepare articles for publication (with faculty coauthors), make presentations at lectures and seminars held for residents and faculty, present papers at state, regional and national medical meetings, and are sent on trips for general educational purposes to such meetings. Upon information and belief, most medical societies that conduct such meetings treat the residents as students and therefore charge reduced registration fees for them.

* * *

Graduate Medical Education Program Residency/Fellowship Agreement, Addendum to Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Sept. 26, 2008) (No. 08-2193)

UNIVERSITY OF MINNESOTA

GRADUATE MEDICAL EDUCATION PROGRAM

RESIDENCY/FELLOWSHIP AGREEMENT

THIS IS AN AGREEMENT by and between the University of Minnesota and Brian Betts, hereinafter referred to as "resident/fellow." The agreement applies to Academic Year 2004/2005; actual dates of coverage are specified in Section IV below.

THE PARTIES AGREE as follows:

1. **PURPOSE.**

The primary purpose of the appointment of a resident/fellow is the successful completion of a graduate medical education training program. During the time period in which residents/fellows are undergoing graduate medical education training at the University of Minnesota, they have the status of students. The residents/fellows shall receive a University appointment as either a Medical Resident, Medical Resident – Graduate Program, Medical Fellow, Medical Fellow- Graduate Program, Training Grant Medical Fellow – Graduate Program, Training Grant Medical Resident – Graduate Program; all are student/professional training categories as designated by the University of Minnesota appointment system. This document and the provisions of the Resident/Fellow Policy Manual referenced in this

agreement govern the relationship between the individual resident/fellow and the University, and take precedence over any other University document or procedure to the extent they are inconsistent with the terms of this statement.

2. **RESPONSIBILITIES OF THE RESIDENT/FELLOW.**

2.1 The resident/fellow agrees to accept the duties, responsibilities, and rotations assigned by the program director or designee and to conduct himself or herself ethically and professionally in keeping with his or her position as a physician, in the care of patients and in relationships with other hospital/clinic staff.

2.2 The resident/fellow agrees to participate fully in the educational and scholarly activities of the residency program and, as required, to assume responsibility for teaching and supervising other residents/fellows and medical students.

2.3 The resident/fellow agrees to provide safe, effective, and compassionate care of patients under faculty supervision, commensurate with the resident's/fellow's level of education and experience.

2.4 The resident/fellow agrees to abide by the bylaws, policies, rules, and regulations of the Medical School, the University of Minnesota and the hospital and clinics to which assigned.

2.5 The resident/fellow agrees to meet state, federal, and University of Minnesota requirements for participating in a residency/fellowship program prior to the start of and throughout the training program. These requirements include: earning an M.D. or D.O. degree; submitting proof of immunization; completing a background study request under Minnesota law; completing HIPAA training; complying

with state licensure requirements either by obtaining a residency permit or unrestricted physician license, as required by the individual residency/fellowship program; obtaining a DEA registration permit if required by the individual program; obtaining a J-1 visa if the resident/fellow is not a U.S. citizen or permanent resident; and complying with any other requirements established by the individual residency/fellowship program.

3. **RESPONSIBILITIES OF THE UNIVERSITY.**

3.1 The University of Minnesota Medical School shall be responsible for providing a graduate medical educational experience and training program through faculty planning, teaching, supervision, and evaluation of residents/fellows.

3.2 The University of Minnesota agrees to perform administrative functions for the benefit of the residents/fellows. These include arranging for the payment of stipends; maintaining certain resident/fellow record; administering the procedure related to the discipline of residents/fellows; and providing mechanisms for the coordination of programs among the affiliated hospitals and clinics, the University of Minnesota Medical School, and the various clinical services.

3.3 The University of Minnesota agrees to provide the following benefits to residents/fellows:

3.3.1 An annual stipend payable on a biweekly basis. This figure will be communicated to residents/fellows by individual programs as soon as the stipend amount is determined.

3.3.2 Uniform benefits available to all medical residents/fellows as set forth in Part A of the Resident/Fellow Policy Manual. These benefits in-

clude: tuition costs of the training program paid by the training program directly or through a supplement to the resident's/fellow's stipend; student rates and benefits for other University services; professional liability insurance covering claims related to duties performed as part of the residency/fellowship, whether such claims arise during or after the resident's/fellow's completion of the program; health insurance and optional dependent coverage; long-term disability insurance; life insurance; optional dental insurance at the resident's/fellow's cost; pre-tax health care and dependent health care reimbursement accounts; optional retirement contributions by the resident/fellow; and counseling and psychological support services through a residency assistance program, including monitoring and assistance for impaired physicians consistent with professional and legal obligations.

3.3.3 Leave benefits, which include parental/family medical leave, professional/academic, personal, vacation and sick leave. These benefits are available to all residents/fellows as set forth in Part A of the Policy Manual, but amounts of vacation and sick leave vary with the policies of each department. See Part B of the Manual.

3.3.4 Other benefits determined at the individual program level as set forth in Section B of the Resident/Fellow Policy Manual. These benefits vary from program to program and **may** include: meal tickets, laundry service, and beeper rental. On-call sleeping quarters are determined by the hospitals where the resident/fellow is assigned.

3.4 The Medical School has established general policies on duty hours/on-call schedules, moonlighting, and the effect of absences on timely completion

of the residency/fellowship program. These matters are set forth in Part A of the Resident/Fellow Policy Manual, and supplemented in Part B with program specific details. Program policies will conform to any applicable requirements of the Accreditation Council for Graduate Medical Education (ACGME) or the relevant American specialty board.

3.5 The Medical School does not require residents to sign a noncompetitive guarantee. Please see Part A of the Resident/Fellow Policy Manual.

4. **RESIDENCY/FELLOWSHIP TERM.**

Traditionally, the majority of residents/fellows successfully complete their training. In keeping with University policy:

4.1 The term of the agreement between the resident/fellow and the University of Minnesota is for a period of approximately one (1) year, starting June 24, 2004 (enter month, day, and year) and ending no later than June 30, 2005 (enter month, day, and year).

4.2 The agreement may be renewed on an annual basis as mutually agreed upon by the resident/fellow and the University. The criteria for promotion and reappointment are set forth in Part A of the Policy Manual.

5. **EVALUATIONS OF ACADEMIC PERFORMANCE**

5.1 A periodic assessment of academic performance of each resident/fellow is the responsibility of the residency program director with input from faculty. Academic performance of a resident/fellow must be evaluated by a careful and deliberate review, including documentation of the resident's/fellow's performance with respect to relevant

exam scores, clinical diagnosis and judgment, medical knowledge, technical abilities, interpretation of data, patient management, communications skills, interactions with patients and other healthcare professionals, professional appearance and demeanor, and/or motivation and initiative. All recorded evaluations of a resident's/fellow's performance are accessible to the resident/fellow.

5.2 A resident/fellow can be disciplined and/or dismissed from the program for academic reasons. Before dismissing a resident/fellow or not renewing a resident's/fellow's contract for academic reasons, the program must give the resident/fellow notice of his/her performance deficiencies, an opportunity to remedy the deficiencies, and notice of the possibility of dismissal or non-renewal if the deficiencies are not corrected.

6. GROUNDS FOR DISCIPLINE AND/OR DISMISSAL OF A RESIDENT/FELLOW FOR NON-ACADEMIC REASONS.

Grounds for discipline and/or dismissal of a resident/fellow for non-academic reasons, as set forth in Part A of the Resident/Fellow Manual, include, but are not limited to, the following:

6.1 Failure to comply with the bylaws, policies, rules, or regulations of the University of Minnesota, affiliated hospitals, medical staff, department, or with the terms and conditions of this document.

6.2 Commission by the resident/fellow of an offense under federal, state, or local laws or ordinances which impacts upon the resident's/fellow's abilities to perform his/her normal duties in the resident/fellow program.

6.3 Conduct which violates professional and/or ethical standards; disrupts the operations of the

University, its departments, or affiliated hospitals; or disregards the rights or welfare of patients, visitors, or hospitals/clinical staff.

7. **DISCIPLINARY AND GRIEVANCE PROCEDURES.**

7.1 Discipline and/or dismissal of a resident/fellow for academic reasons under Section V above may be grievable under the Regents "Student Academic Grievance Policy," set forth in Part A of the Resident/Fellow Policy Manual. Residents/Fellows also may utilize this University grievance procedure for other complaints related to education and academic services to the extent covered by the grievance policy.

7.2 Residents/Fellows who are disciplined and/or dismissed for non academic reasons under Section V above are entitled to certain procedures as set forth in the policy on "Discipline/Dismissal of Residents/Fellows" found in Part A of the Resident/Fellow Policy Manual. These procedures are outlined in a section labeled "Discipline/ Dismissal for Non Academic Reasons." They include notice of the disciplinary charges, an opportunity to respond to the allegations before discipline is imposed, and a hearing at the resident's/fellow's request by a three person panel in the Medical School to appeal any discipline imposed for non-academic reasons.

7.3 Discipline imposed for either academic or non-academic reasons is implemented on the effective date determined by the program, regardless of whether the resident/ fellow contests the discipline. The procedures referenced in paragraphs A and B above for contesting discipline are mutually exclusive; under no circumstances will a resident/fellow be afforded both the procedures outlined under the Re-

gents' Student Academic Grievance Policy and the procedures set forth in the manual under the provision entitled "Discipline/Dismissal For Non-Academic Reasons."

7.4 The University of Minnesota is committed to the policy that all persons shall have equal access to its programs, facilities, and employment without regard to race, color, creed, religion, national origin, sex, age, marital status, disability, public assistance status, veteran's status, or sexual orientation. Sexual harassment is a form of sex discrimination prohibited under this policy. Residents/Fellows who believe they have been subjected to discrimination on any of these grounds are urged to contact. their program director or department chair. Complaints also may be pursued through the Medical School Dean's Office or the University of Minnesota Office of Equal Opportunity and Affirmative Action, as set forth in Part A of the Resident/ Fellow Policy Manual.

7.5 Residents/Fellows who are disqualified from direct contact with patients under the criminal background study required by Minnesota law, Section 144.057, will be dismissed from the residency/fellowship program or have their acceptance revoked if they have not started the program training yet. The resident/fellow may appeal this decision to a panel of the Graduate Medical Education Committee in the Medical School under the terms of the "Academic Health Center Policy on Student Background Checks." This policy is set forth in Part A of the Resident/Fellow Policy Manual.

8. **RESIDENCY CLOSURE/REDUCTION.**

If the University of Minnesota reduces the size of a residency/fellowship program or closes a program, affected residents/fellows will be notified as soon as

possible; arid the University will make every effort within budgetary constraints to allow existing residents/fellows to complete their education. In the unlikely event that existing residents/fellows are displaced by a program closure or reduction, the University will make every effort to assist the residents/fellows in locating another residency/fellowship program where they can continue their education.

9. **PART A RESIDENT/FELLOW MANUAL.**

Upon signature of this Agreement, the resident/fellow indicates receipt of the Resident/Fellow Part A Manual.

REDACTED

RESIDENT/FELLOW

Date: 4/8/04 By: [s]

Name: Brian Betts

* SS#:

UNIVERSITY OF MINNESOTA

Date: 5/4/04 By: [s]

Name: Deanette A. Schmidt
Dean of the University of Minnesota
Medical School or his/her designee

APPROVED BY RESIDENCY/FELLOWSHIP PROGRAM DIRECTOR

Date: 4/27/04

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Reply Brief of the United States, *Regents of Univ. of Minn. v. United States* (8th Cir. filed Oct. 9, 2008) (No. 08-2193)

* * *

To be sure, the regulation was amended partly in response to the recent wave of litigation concerning the status of medical residents as "students" that has produced mixed results (*see* Op. Br. 42 n.7), including these decisions. As the Treasury explained in its notice of proposed rulemaking (69 Fed. Reg. 8604, 8605 (Feb. 25, 2004)), however, the problem of classifying service in the nature of on-the-job training is illustrated by, but is by no means limited to, the situation of medical residents.

* * *

PETITIONER'S BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH; MAYO CLINIC; AND REGENTS OF THE UNIVERSITY OF MINNESOTA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Treasury Department can categorically exclude all medical residents and other full-time employees from the definition of "student" in 26 U.S.C. § 3121(b)(10), which exempts from Social Security taxes "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceedings below.

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The court of appeals' opinion is reported at 568 F.3d 675. Pet. App. 1a. The order denying the petition for rehearing and rehearing en banc is unreported. *Id.* at 66a. The opinion of the United States District Court for the District of Minnesota in *Mayo Foundation for Medical Education & Research v. United States* is reported at 503 F. Supp. 2d 1164. *Id.* at 20a. The opinion of the district court in *Regents of the University of Minnesota v. United States* is unpublished but is electronically reported at 2008 WL 906799. *Id.* at 47a.

JURISDICTION

The court of appeals filed its opinion on June 12, 2009. It denied petitioners' timely petition for rehearing and rehearing en banc on September 17, 2009. On December 7, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 15, 2010. No. 09A545. The petition was filed on January 14, 2010, and granted on June 1, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Internal Revenue Code and the Treasury Department's implementing regulations are set forth in the appendix to this brief.

STATEMENT

The Student Exemption to the Federal Insurance Contributions Act exempts from Social Security taxes all compensation for "service performed in the

employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10). In response to a series of judicial decisions holding that the Student Exemption can encompass medical residents, the Treasury Department promulgated a regulation that purports to narrow the statutory exemption by *categorically* excluding all full-time employees—including medical residents—from the Exemption. Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii).

The Eighth Circuit upheld this so-called "full-time employee" regulation on the ground that the statutory term "student" is ambiguous and that the regulation is a reasonable interpretation of the Student Exemption. Pet. App. 12a, 18a. That decision disregards the plain and unambiguous language of the Student Exemption and fundamentally misapprehends the nature of medical residency programs. It should be reversed.

1. To fund the Social Security system, FICA imposes a payroll tax on "wages" that is assessed on both employers and employees. 26 U.S.C. §§ 3101, 3111. FICA defines "wages" as "remuneration for employment" (*id.* § 3121(a)), but excludes from the definition of "employment" "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university." *Id.* § 3121(b)(10).

Congress enacted the Student Exemption in 1939. A year later, the Treasury Department adopted regulations that provided that "student" status would be determined "on the basis of the relationship of such employee with the organization for

which the services are performed" and that an employee who performs services "as an incident to and for the purpose of pursuing a course of study" is a "student" within the meaning of the Student Exemption. Treas. Reg. § 31.3121(b)(10)-2(c) (2004). That regulation, which remained substantially unchanged for the next six decades, permitted medical residents to qualify for the Student Exemption where they otherwise satisfied the Exemption's statutory criteria—even if they worked more than forty hours per week. Pet. App. 42a & n.12.

2. The medical education of a doctor begins, but does not end, in medical school. Students enrolled in medical school primarily attend lecture-based classes for two years and then begin two years of "generally all clinical experiences." J.A. 189a. In those final two years, they "interact with patients in the hospital wards as part of a system called 'rotations.'" *United States v. Mt. Sinai Med. Ctr. of Fla., Inc.*, 2008 WL 2940669, at *4, *36 (S.D. Fla. July 28, 2008); *see also id.* at *2-18 (examining an extensive factual record about medical education, in general, and the residency program at Mt. Sinai Medical Center, in particular). "Those patient care activities that occur in the third and fourth years of medical school[ ] are 'quite analogous' to what [later] happens for the period of residency training." *Id.* at *4-5. "The third-year medical student 'practices' medicine by rotating through various specialties such as medicine, surgery, pediatrics, psychiatry, and obstetrics and gynecology. The fourth-year medical student continues her clinical training by rotating through other specialties and subspecialties." Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 Geo. L.J. 1749, 1793 (1995).

Upon graduation from medical school, "physicians are not deemed fully trained to independently practice medicine" (*Mt. Sinai*, 2008 WL 2940669, at *3) because "they have not fully learned how to safely perform medical procedures on patients." Pet. App. 62a. Although a "general practitioner" can theoretically obtain a license to practice medicine after one year of post-medical-school training, "the general practitioner has disappeared; indeed, it has not existed since the 1970s" because "it became unsafe to practice" without a specialty such as family medicine, internal medicine, or pediatrics. *Mt. Sinai*, 2008 WL 2940669, at *3 n.6. "In the modern practice of medicine, someone holding themselves out as a general practitioner would have no possibility of obtaining hospital privileges." *Id.* Accordingly, doctors seek to become "board certified" in a specialty by a standard-setting organization; those organizations uniformly require doctors to complete an accredited medical residency program as a prerequisite to certification. *Id.* at *3; *see also United States v. Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 1007 (D. Minn. 2003) ("*Mayo I*") ("to practice medicine in a given field, and in most cases to be admitted to a hospital staff, an individual holding an M.D. degree typically must (1) complete an accredited residency training program of at least three years' duration in a clinical specialty field, and (2) become certified by a specialty board that is a member of the American Board of Medical Specialties").

As a result, recent medical school graduates continue their medical education by applying to accredited three-to-five-year residency programs like those offered by petitioners. They "apply to . . . a residency program for an educational purpose" (Pet. App. 38a

n.8) and based on a program's "ability to support their further education" through course offerings and mentoring opportunities. *Mt. Sinai*, 2008 WL 2940669, at *5. The aspiring resident "does not view the process to be one of picking his first 'job'"—in part because a resident is "not likely to stay on staff as an attending physician after completion of the[ ] residency." *Id.*; *see also Mayo I*, 282 F. Supp. 2d at 1001 n.8 ("when they began their residencies, they had no expectation of being hired by the [Mayo] Foundation as a staff physician upon completion of their programs"). Rather, the aspiring resident views the application process "in the same way high school students, when applying to college, judge whether a degree from college A or a degree from college B [is] going to help [them] more." *Mt. Sinai*, 2008 WL 2940669, at *5 (alterations in original; internal quotation marks omitted). In turn, schools admit residents based on exam scores, entrance applications, and interviews "similar to what . . . children would go through when they apply to college." J.A. 117a-18a.

Once admitted, residents are enrolled and registered each year in "a formal and structured educational program." Pet. App. 38a n.8; *see also id.* at 63a; J.A. 145a. Residency programs "undergo regular internal and external review to ensure that they abide by and comply with" the curricula and institutional requirements of an accrediting organization. *Mt. Sinai*, 2008 WL 2940669, at *7. The most prominent of these organizations is the Accreditation Council for Graduate Medical Education ("ACGME"), which accredits petitioners' programs. Failure to comply with the ACGME's strict academic requirements can result in the loss of accreditation, which has "serious consequences" for both schools and their

residents: "[P]rograms that lose ACGME accreditation are not eligible for Medicare [Graduate Medical Education] funding and, in addition, residents must complete ACGME-accredited residency programs in order to be eligible to take examinations for board certification in their specialties." ACGME, ACGME Duty Hours Standards Fact Sheet, http://www.acgme.org/acWebsite/newsRoom/newsRm_dutyHours.asp.

The ACGME is "a major driving force in the standardization of robust educational curricula across all teaching hospitals." *Mt. Sinai*, 2008 WL 2940669, at *7. First, it requires residents to attend conferences and lectures, and to engage in laboratory research and other scholarly activities. *Id.* at *8. Second, the ACGME requires faculty to undertake scholarly pursuits. *Id.* Third, it "requires sponsoring institutions to provide all residents with appropriate financial support," which in petitioners' programs consists of annual stipends of between $40,000 and $60,000; those stipends are intended to cover cost-of-living expenses, but are not "a competitive wage" or "bargained-for compensation" and "represent a far cry from the salaries drawn by fully trained and licensed physicians." *Id.* at *8, *34; *see also* Pet. App. 17a. Fourth, the ACGME prohibits hospitals from relying on medical residents for tasks that lack educational value. *See* J.A. 55a; *Mt. Sinai*, 2008 WL 2940669, at *9. For example, hospitals must use other individuals to draw blood, start an IV, or schedule tests in order to "free the residents up for more educational opportunities." J.A. 136a; *see also Mayo I*, 282 F. Supp. 2d at 1015 (the Mayo Foundation "seeks to ensure that allied healthcare personnel perform ancillary procedures that have no 'educational value'"). Those educational opportunities include "prepar[ing]

articles for publication (with faculty coauthors), mak[ing] presentations at lectures and seminars held for residents and faculty, present[ing] papers at state, regional and national medical meetings, and [being] sent on trips for general educational purposes." J.A. 208a.

The ACGME also requires that residency programs provide each medical resident with a "comprehensive . . . didactic core curriculum and written syllabus." *Mayo I*, 282 F. Supp. 2d at 1004. For each course (known as a "rotation"), medical residents are "assigned textbooks and journal articles relevant to the subject matter." *Id.* In addition, their regular attendance is mandatory at core curriculum conferences, primary care conferences, morbidity and mortality conferences, and journal clubs, as well as at grand rounds, where residents hear a lecture in a large group setting, followed by a question-and-answer session. *See* Pet. App. 41a n.10, 63a; *Mayo I*, 282 F. Supp. 2d at 1004.

Even though medical residents attend as many as "900 lectures and conferences" over the course of their residency programs (*Mayo I*, 282 F. Supp. 2d at 1004, 1016), their "principal classroom"—like that of third- and fourth-year medical students—is "the clinical setting," where "they learn by caring for patients in a medical specialty under the supervision of a [ ]faculty member." Pet. App. 62a-63a. Moving from patient to patient on "rounds," a faculty member "conduct[s] didactic sessions with the residents both during and/or after rounds that would draw out and explain the salient educational points of each patient's condition." *Mayo I*, 282 F. Supp. 2d at 1003. This "learning process . . . consist[s] largely of residents making suggestions to the staff physicians and the staff physicians correcting the residents." *Id.* at

1018. By spending, on average, forty or more hours per week caring for patients, "a resident learn[s] by doing a medical task under the direct and personal guidance" of a faculty member, who, "the whole time," is "looking over [the resident's] shoulder." *Id.* at 1003, 1018 (internal quotation marks omitted); *see also* Joseph H. King, *The Standard of Care for Residents and Other Medical School Graduates in Training*, 55 Am. U. L. Rev. 683, 697 (2006) ("Residencies are really preceptorships, in which the students learn by caring for patients under the watchful eye of a university faculty member or an attending private practitioner.") (internal quotation marks omitted). This method of education is "necessary" because "[a] future physician cannot adequately develop skills if not permitted to perform actual procedures on real patients." *Minnesota v. Chater*, 1997 WL 33352908, at *7 (D. Minn. May 21, 1997).

Through this hands-on learning process, "[r]esidents usually slow things down and cost [faculty physicians] time" (J.A. 73a), because faculty "could . . . easily provide[ ] patient-care services in a more efficient and quicker fashion if they didn't have residents." Pet. App. 65a (internal quotation marks and alterations omitted). "[L]arge portions of the patient-care services performed by residents—such as physical examinations and the review of test results—[are] repeated by the supervising staff physicians . . . ultimately responsible for the patients' care." *Mayo I*, 282 F. Supp. 2d at 1018.

"This inefficiency . . . is recognized by Medicare." *Mt. Sinai*, 2008 WL 2940669, at *4. In addition to providing reimbursement for "the cost of direct graduate medical educational activities" (42 C.F.R. § 413.75(a)(1)), Medicare "provides a payment to teaching hospitals over and above that which is typi-

cally provided for a given patient care service[,] in part, due to its recognition that teaching hospitals' efficiency is diminished by the presence of residents." *Mt. Sinai*, 2008 WL 2940669, at *4; *see also* 42 C.F.R. § 412.105.

As medical residents progress through their programs, they take written examinations—including "in-training" exams, national specialty exams, and exams designed for certain rotations—and faculty physicians evaluate and grade their performance in each rotation. *See* Pet. App. 63a-64a; *Mayo I*, 282 F. Supp. 2d at 1004. The "assessment of academic performance" includes a "careful and deliberate review" of "relevant exam scores, clinical diagnosis and judgment, medical knowledge, technical abilities, interpretation of data, patient management, communications skills, interactions with patients and other healthcare professionals, professional appearance and demeanor, and/or motivation and initiative." J.A. 213-14a.

"[L]ike nonresident students," a medical resident can be academically disciplined, required to repeat a course, or dismissed from the school if the resident's academic performance is at a failing level. *Chater*, 1997 WL 33352908, at *7; *see also* Pet. App. 64a n.17. When medical residents are dismissed from a state-sponsored residency program, they are not entitled to all the due process rights of a typical terminated state employee. *See Shaboon v. Duncan*, 252 F.3d 722, 731 (5th Cir. 2001) (a medical resident dismissed from a state-sponsored program "can prevail . . . only . . . if the [teaching hospital] . . . failed to accord her the minimum procedural protections owed in cases of student dismissal"). Instead, "[t]he decision to terminate a resident from a hospital-based residency program is the same as any other decision

to fail a graduate student for inability to meet academic requirements." *Ross v. Univ. of Minn.*, 439 N.W.2d 28, 33 (Minn. Ct. App. 1989).

If medical residents successfully complete their educational programs, they "receive[ ] diplomas or certificates of completion . . . at a graduation ceremony." Pet. App. 64a n.17; *see also Mayo I*, 282 F. Supp. 2d at 1004. The graduation marks the end of their formal education and the beginning of their professional careers. For the first time, they are considered fully trained to practice medicine independently, having received a "graduate medical education" that "is absolutely vital" in molding them from "inexperience[d] doctors who graduate[d] from medical school" into "sophisticated and accomplished practitioners in a complex world of medical specialization." *Mt. Sinai*, 2008 WL 2940669, at *2. Other than universities, foundations, and teaching hospitals like petitioners, "[n]o other institutions in the United States . . . carry out this essential role and function." *Id.*

3. Petitioners Mayo Foundation for Medical Education and Research and Mayo Clinic ("Mayo"), and petitioner Regents of the University of Minnesota ("University") sponsor medical residency programs accredited by the ACGME. Pet. App. 22a, 48a; U.S. C.A. App. 300 (No. 08-2193).

In 1990, the Social Security Administration issued a formal notice of assessment to the University for unpaid Social Security taxes on its medical residents' stipends. *See Minnesota v. Apfel*, 151 F.3d 742, 743 (8th Cir. 1998). The Eighth Circuit overturned that assessment, holding that stipends paid to medical residents at the University were exempt from Social Security taxes because the residents

qualified for the Social Security Act's Student Exemption (42 U.S.C. § 410(a)(10)), which is identical to FICA's Student Exemption. *Apfel*, 151 F.3d at 748. The Exemption applied, the court explained, because "the primary purpose for the residents' participation in the program is to pursue a course of study rather than to earn a livelihood." *Id.*[1]

Several years later, the District of Minnesota held that Mayo's medical residents were also exempt from Social Security taxes. *Mayo I*, 282 F. Supp. 2d at 1018. Rejecting the government's argument that medical residents' long hours categorically disqualified them from the Student Exemption, the district court held that "[t]ime alone cannot be the sole measure of the relationship between services performed and a course of study." *Id.* The court concluded that, in contrast to the government's categorical approach, medical residents' eligibility for the Student Exemption depends on a "fact-specific, case-by-case examination" of whether the residents satisfy the criteria set forth in the statutory exemption. *Id.* at 1007. In the case of Mayo's medical residents, the

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[1] For the tax periods at issue in *Apfel*, the University's status as a state entity meant that it was covered under a Social Security coverage agreement between the State of Minnesota and the federal government. *See Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 536 (2002) (the University is "an arm of the State of Minnesota"). Accordingly, the Eighth Circuit held both that medical residents were not "employees" under the coverage agreement and that, even if medical residents were "employees," they were statutorily excluded from coverage under the Social Security Act's Student Exemption. 42 U.S.C. § 410(a)(10). In 1987, Social Security taxation of state employees was transferred to the FICA provisions of the Internal Revenue Code. Pub. L. No. 99-509, § 9002(b)(1)(A), 100 Stat. 1874, 1971-72 (1986).

court found that the educational purpose of their patient care predominated over its service aspect and that they were accordingly students covered by the Student Exemption. *Id.* at 1018. The government filed a notice of appeal to the Eighth Circuit but subsequently dismissed that appeal.

Less than two months later, the Treasury Department attempted to create through the regulatory process what it had repeatedly failed to secure in court and had refused to seek from Congress: a categorical exclusion of medical residents and all other full-time employees from the Student Exemption. Explicitly acknowledging its desire to overturn the decisions holding that medical residents at Mayo and the University are students and therefore exempt from Social Security taxes, the Treasury Department proposed, and later adopted, amendments to its regulations interpreting the Student Exemption. Student FICA Exception, 69 Fed. Reg. 8,604 (Feb. 25, 2004); *see also* J.A. 219a ("the regulation was amended partly in response to the recent wave of litigation concerning the status of medical residents as 'students'"); Student FICA Exception, 69 Fed. Reg. 76,404 (Dec. 21, 2004) (final regulation).

One of the new regulations excludes all "full-time employees" from the Student Exemption. Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii). According to the full-time employee regulation, an employee whose "normal work schedule" is at least 40 hours per week is a full-time employee and categorically ineligible for the Student Exemption. *Id.* As a specific example of a full-time employee, the regulation lists a medical resident whose "normal work schedule, which includes services having an educational, instructional, or training aspect, is 40 hours or more per week." *Id.* § 31.3121(b)(10)-2(e), Ex. 4.

After promulgating the full-time employee regulation, and unsuccessfully contesting the tax-exempt status of medical residents under the preexisting regulations for more than twenty years, the government formally "*accept[ed]* the position . . . that medical residents are *exempt* from FICA taxes for tax periods" preceding April 1, 2005, the effective date of the full-time employee regulation. Br. in Opp. 14 n.2 (emphases added); *see also* IRS, Press Release, IRS to Honor Medical Resident FICA Refund Claims (Mar. 2, 2010).

4. Mayo and the University filed separate tax refund actions in the District of Minnesota that challenged the Treasury Department's attempt to use the full-time employee regulation to categorically exclude their medical residents from the Student Exemption for tax periods after March 31, 2005. The district court invalidated the regulation.

In Mayo's suit, the district court concluded "that the term 'student' is not ambiguous" because it "is well defined and commonly understood outside the context of the Student Exclusion." Pet. App. 39a. It found the government's contrary position to be "quite puzzling" because, "in *Mayo I*, this Court expressly determined that the Student Exclusion was not ambiguous and cited to an extensive factual record as to . . . why medical residents qualify for the 'student' exclusion from FICA taxation." *Id.* at 31a n.3 (citing *Mayo I*, 282 F. Supp. 2d at 1007, 1013-18). The district court explained that the "full-time employee exception arbitrarily narrows [the ordinary definition of 'student'] by providing that a 'full-time' employee is not a 'student' even if the educational aspect of an employee's service predominates over the service aspect." *Id.* at 40a.

The district court applied that holding in the University's suit, and concluded that medical residents at the University, like those at Mayo, are "students" within the meaning of the Student Exemption. Pet. App. 65a.

5. The Eighth Circuit heard the government's appeals together and reversed in a single opinion. Acknowledging that the case presented a "difficult issue," the court of appeals held that the full-time employee regulation is valid under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because the term "student" is ambiguous and the full-time employee regulation is a reasonable interpretation of the statutory Student Exemption. Pet. App. 12a, 18a. In so holding, the panel expressly acknowledged that "four of our sister circuits have recently declared, in cases arising under the former regulations, that the student exception statute is unambiguous" and can include medical residents enrolled in medical residency programs and regularly attending classes. *Id.* at 9a (citing *United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27 (2d Cir. 2009); *United States v. Detroit Med. Ctr.*, 557 F.3d 412, 417-18 (6th Cir. 2009); *Univ. of Chi. Hosps. v. United States*, 545 F.3d 564, 567 (7th Cir. 2008); *United States v. Mt. Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1251-56 (11th Cir. 2007)). The Eighth Circuit conceded that, "[i]f that interpretation of the statute is correct, we must affirm." *Id.*

The Eighth Circuit nevertheless expressly rejected the decisions of the Second, Sixth, Seventh, and Eleventh Circuits. Pet. App. 10a. According to the Eighth Circuit, those courts' "interpretation of [the Student Exemption] . . . cannot be correct" because the Student Exemption is ambiguous and can

reasonably be construed as categorically excluding all full-time employees, including medical residents. *Id.* "[W]hen the context is a provision of the Internal Revenue Code," the court asserted, "a Treasury Regulation interpreting the words is nearly *always* appropriate." *Id.* at 12a (emphasis added).

SUMMARY OF ARGUMENT

I. The Eighth Circuit's decision upholding the full-time employee regulation's categorical exclusion of medical residents from the Student Exemption cannot be reconciled with the unambiguous statutory language of the Exemption.

A. The Student Exemption to FICA exempts from Social Security taxes all compensation for "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10). That language unambiguously exempts petitioners' medical residents from FICA taxation because the definition of "student"—one who engages in "study" by applying the mind "to the acquisition of learning" (*Oxford Universal Dictionary* 2049-50 (3d ed. 1955))—plainly encompasses petitioners' residents. If Congress had intended to exclude from the Student Exemption individuals engaged in hands-on, clinical education for more than forty hours per week, it would have said so. Its decision not to engraft such a restriction on the plain meaning of the statutory term "student" is controlling here.

B. Six factors establish that petitioners' medical residents are unambiguously "students" within the meaning of the Student Exemption.

1. Petitioners' medical residents are enrolled and regularly attending classes in petitioners'

graduate medical education programs. In addition to attending hundreds of lectures and conferences throughout their residencies, they participate in a series of clinical courses in which they develop their medical skills through hands-on patient care under the close supervision of faculty members.

2. The education that a medical resident receives through this combination of hands-on learning and classroom instruction is a requirement for medical school graduates, who are effectively ineligible to obtain hospital privileges to practice medicine without completing a residency program.

3. Aspiring medical residents thus apply to residency programs exclusively for an educational purpose. Indeed, they have no expectation of being hired by Mayo or the University upon completion of their residency programs, and they choose a residency program based not on salaries or typical career considerations but instead based on the schools' course offerings and mentoring opportunities.

4. Once accepted into petitioners' residency programs, ACGME academic accreditation requirements require that medical residents engage in patient care solely for educational purposes. Petitioners derive no financial benefit from the patient care provided by their residents. In fact, petitioners lose money from their training of medical residents, and receive Medicare reimbursements both for the direct costs of providing medical education and for the indirect costs attributable to the inefficiencies that arise when patient care is provided by residents acting under the supervision of attending physicians.

5. Moreover, the academic program of a medical resident is virtually indistinguishable from that of a third- or fourth-year medical student—both learn

through a combination of hands-on patient care and academic instruction—and this Court has already held that individuals in their third and fourth years of medical school are students. *See Bd. of Curators v. Horowitz*, 435 U.S. 78, 89 (1978).

6. Finally, Congress, academic accrediting organizations, and medical residents themselves have all used the term "student" to classify medical residents.

II. Because "Congress has directly spoken to the precise question at issue[,] . . . that is the end of the matter." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). But even if the Student Exemption did not unambiguously encompass petitioners' medical residents, the full-time employee regulation would still be an arbitrary and unreasonable interpretation of the statutory exemption.

A. The full-time employee regulation distinguishes between individuals based solely on the amount of time they are engaged in the pursuit of learning and on whether they spend the majority of their time learning from books and lectures or from clinics and observation. Those distinctions are entirely arbitrary because a person engaged in learning does not become any less of a student when he studies for long hours or through hands-on training rather than classroom instruction.

B. The full-time employee regulation also fails to satisfy any of the factors that, under *Chevron* and *National Muffler Dealers Association v. United States*, 440 U.S. 472 (1979), determine the reasonableness of a revenue regulation.

1. The full-time employee regulation cannot be harmonized with the origin or purpose of FICA and the Student Exemption. Congress's decision to combine two earlier versions of the Exemption—one of which included explicit restrictions on the amount of remuneration that a student could earn—into a single statutory provision with *no* restrictions on wages or hours demonstrates that Congress did not intend to limit statutory eligibility to individuals who work less than full time. The full-time employee regulation is also inconsistent with FICA's purpose of collecting revenue to pay for Social Security benefits earned during a worker's career because the regulation requires the assessment of FICA taxes *before* doctors are eligible to embark on their careers.

2. The full-time employee regulation is not a contemporaneous construction of the Student Exemption. To the contrary, the only contemporaneous construction by the Treasury Department established a regulatory standard that, as the government now concedes (Br. in Opp. 14 n.2), would allow medical residents to qualify for the Student Exemption.

3. Moreover, the full-time employee regulation did not evolve in an authoritative manner. Instead, as the Treasury Department admits, the purpose of the newly promulgated regulation was to overturn adverse judicial decisions without seeking an amendment of the Student Exemption from Congress.

4. Nor has the full-time employee regulation been in effect long enough to generate significant reliance. In fact, far from relying on it, petitioners immediately challenged the validity of the regulation.

5. Finally, the government has adopted, and then discarded, a series of conflicting positions regarding the FICA tax status of medical residents. The government did not attempt to collect FICA taxes on the stipends paid to petitioners' medical residents until fifty years after the Student Exemption was enacted. When the government eventually embarked on its two-decades-long effort to collect those taxes, it adopted inconsistent litigation and regulatory positions on the issue—before finally conceding in 2010 that, prior to the promulgation of the full-time employee regulation, petitioners' residents were indisputably eligible for the Student Exemption.

ARGUMENT

I. THE STATUTORY TERM "STUDENT" UNAMBIGUOUSLY ENCOMPASSES PETITIONERS' MEDICAL RESIDENTS.

When reviewing an agency's construction of a statute, this Court first asks "whether Congress has directly spoken to the precise question at issue," because "[i]f the intent of Congress is clear, that is the end of the matter." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). In this case, Congress has chosen to exempt from FICA taxation "students" employed by schools where they are "enrolled and regularly attending classes." 26 U.S.C. § 3121(b)(10). Because the term "student" unambiguously encompasses medical residents enrolled and attending classes at petitioners' institutions, the Treasury Department's attempt to categorically exclude all residents from the Student Exemption is unlawful.

A. The Eighth Circuit Erred In Assuming That The Statutory Term "Student" Does Not Have A Plain Meaning.

As four circuits have held, the term "student" unambiguously encompasses medical residents who are enrolled in medical residency programs and regularly attending classes. *See United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27 (2d Cir. 2009); *United States v. Detroit Med. Ctr.*, 557 F.3d 412, 417-18 (6th Cir. 2009); *Univ. of Chi. Hosps. v. United States*, 545 F.3d 564, 567 (7th Cir. 2008); *United States v. Mt. Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1251-56 (11th Cir. 2007). The Eighth Circuit reached a contrary conclusion by employing a flawed premise—that words (like "student") that have a "common or plain meaning in other contexts" are "nearly always" ambiguous "when the context is a provision of the Internal Revenue Code." Pet. App. 10a, 12a. Thus, according to the Eighth Circuit, the first step of *Chevron* is categorically inapplicable in tax cases.

To the contrary, this Court, "[i]n interpreting the meaning of the words in a revenue Act, . . . look[s] to the 'ordinary, everyday senses' of the words." *Comm'r v. Soliman*, 506 U.S. 168, 174 (1993) (quoting *Malat v. Riddell*, 383 U.S. 569, 571 (1966)). The Eighth Circuit thus assumed the *opposite* of what "[c]ourts [should] properly assume"—that "absent sufficient indication to the contrary, . . . Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.'" *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 388 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

None of the cases cited by the Eighth Circuit substantiates its position that commonly understood terms are infused with ambiguity simply because they appear in a provision of the Internal Revenue Code. Pet. App. 10a-11a. In each of those cases, this Court expressly held that the statutory term at issue did not have an ordinary, common meaning or was plainly being used as a legal term of art. In *National Muffler*, for example, the Court recognized that the "statute's term 'business league' has no well-defined meaning or common usage outside the perimeters of the" statute. 440 U.S. at 476, 488. Similarly, in *United States v. Correll*, 389 U.S. 299 (1967), the Court concluded that the "language of the statute—'meals and lodging . . . away from home'—is obviously not self-defining." *Id.* at 304 (alteration in original); *see also Cottage Savings Ass'n v. Comm'r*, 499 U.S. 554, 561-62 (1991) (treating the statutory phrase "disposition of property" as a term of art that codified principles set forth in the Court's "landmark precedents" in the area, and holding that the Treasury Department had construed the phrase in a manner "consistent with" those precedents); *Magruder v. Washington, Balt. & Annapolis Realty Corp.*, 316 U.S. 69, 73 (1942) ("The crucial words of the statute, 'carrying on or doing business,' are not so easy of application to varying facts that they leave no room for administrative interpretation."); *Helvering v. Reynolds*, 313 U.S. 428, 430-31 (1941) (rejecting as "not tenable" the argument that the statutory phrase "at the time of such acquisition" had "a definite meaning").

The term "student," in contrast, does have an "ordinary, contemporary, common meaning" that can be found in the dictionaries on which both petitioners and the government rely. A "student" is a person

who engages in "study" by applying the mind "to the acquisition of learning, whether by means of books, observation, or experiment." *Oxford Universal Dictionary* 2049-50 (3d ed. 1955); *see also Webster's New International Dictionary* 2502 (2d ed. 1939) (a "student" is a "person engaged in study . . . esp[ecially], one who attends a school"). The *Random House Webster's Unabridged Dictionary*, cited by the government, similarly defines "student" as a "pupil" or "person formally engaged in learning, esp[ecially] one enrolled in a school or college." Br. in Opp. 10 (citing *Random House Webster's Unabridged Dictionary* 1888 (2d ed. 2001)); *see also Soliman*, 506 U.S. at 174 (relying on a dictionary to find the "commonsense meaning" of a term in a revenue statute).

The Student Exemption's requirement that students be "enrolled and regularly attending classes at [a] school, college, or university" (26 U.S.C. § 3121(b)(10)) underscores that an agency may not further narrow the "ordinary, contemporary, common meaning" of "student." As the district court below explained, "Congress already put its limitations on the word 'student'—those limitations only require a student to be enrolled and regularly attending classes. Congress did *not* put any limitation on 'student' with regard to how much that individual might be working in some ancillary capacity." Pet. App. 39a-40a. Congress's unambiguously expressed choice not to impose such hours-based limits is dispositive—and cannot be altered by the Treasury Department. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (applying the "*expressio unius*" canon of construction).

B. Six Factors Demonstrate That The Student Exemption Unambiguously Encompasses Petitioners' Medical Residents.

Six factors establish that the medical residents enrolled at Mayo and the University unambiguously fall within the plain meaning of the statutory term "student."

1. Petitioners' medical residents are "enrolled and regularly attending classes" in petitioners' graduate medical education programs. 26 U.S.C. § 3121(b)(10). Mayo's "[r]esidents are enrolled in [residency] programs" (Pet. App. 22a) when an administrative secretary "record[s] a 'Y' (for 'Yes') in the 'Enrolled' data field of the [record] system" for each medical resident. *United States v. Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 1016 (D. Minn. 2003) ("*Mayo I*"). Through a similar process, "[p]rogram coordinators at the University [of Minnesota] register[ ] residents for courses." Pet. App. 63a n.16; *see also* J.A. 145a, 157a. Indeed, the government itself has conceded that medical residents are enrolled at petitioners' institutions. *See, e.g., id.* at 18a (stating that residents' "enrollment" was "just the start . . . of the student status analysis").

During their three-to-five-year residency programs, residents participate in a series of required and elective four-week rotations, which each have a written curriculum. In addition to requiring attendance at lectures and the completion of reading assignments, rotations provide residents with an opportunity to develop their medical skills by treating patients under the supervision of attending physicians, who provide residents with feedback on their

proposed courses of treatment and patient care skills. *See* Pet. App. 38a n.8, 63a. As this Court has recognized, the fact that these rotations take place in a clinical setting does not diminish the fact that residents engage in patient care for an educational purpose. Graduate medical education programs, the Court has explained, give "residents clinical training in various medical specialties. Because participants learn both by treating patients and by observing other physicians do so, GME programs take place in a patient care unit (most often in a teaching hospital), rather than in a classroom." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 507 (1994).

Moreover, the Treasury Department itself has long-recognized that student status does not require instruction in a traditional classroom setting. *See* Rev. Rul. 78-17, 1978-1 C.B. 306 (advanced graduate student no longer receiving classroom instruction qualified for the Student Exemption); IRS Gen. Couns. Mem. 37252, 1977 WL 46189 (Sept. 14, 1977) (an enrolled individual who attended no lectures but conducted "research and experimentation . . . under the supervision of a committee of faculty members" that are "part of the degree program" was "regularly attending classes" because the Student Exemption should not be "so narrowly construed as to limit the exception to one who actually attends a classroom lecture"). Even in this litigation, the government has equated clinical courses with other academic instruction, conceding that medical residents' "failure to meet academic standards . . . may, of course, include clinical performance." J.A. 19a.

2. Medical school graduates are effectively barred from practicing medicine without completing a medical residency program. "Unlike 'regular' doctors who must be licensed to practice medicine, resi-

dents in their first year are not eligible for licensure and residents beyond their first year need not obtain a license because they are considered 'students' under Minnesota law." *Minnesota v. Chater*, 1997 WL 33352908, at *7 (D. Minn. May 21, 1997) (citing Minn. Stat. § 147.09(5)). Even if a medical school graduate obtains a license after a year of residency, "licensure . . . is of no real significance" because a doctor cannot practice medicine in a hospital setting without completing a residency or, in an increasing majority of hospital facilities, without certification in a specialty, which requires the successful completion of a residency program. *United States v. Mt. Sinai Med. Ctr. of Fla., Inc.*, 2008 WL 2940669, at *3 n.6 (S.D. Fla. July 28, 2008); *see also* Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 Geo. L.J. 1749, 1791 (1995) ("If a physician wishes to practice medicine, she has little choice but to seek a residency position . . . .").

Any doctor attempting to practice medicine in a hospital setting without a specialty obtained through a medical residency program "would have no possibility of obtaining hospital privileges" because it is considered "unsafe to practice" without a specialty. *Mt. Sinai*, 2008 WL 2940669, at *3 n.6. This distinguishes a recent medical school graduate from a recent law school graduate, who "can immediately sit for the bar examination after graduation from an accredited school, and may immediately begin the practice of law after passing that examination." *Ctr. for Family Med. v. United States*, 2008 WL 3245460, at *10 (D.S.D. Aug. 6, 2008).

3. Accordingly, aspiring medical residents "apply to . . . a residency program for an *educational* purpose." Pet. App. 38a n.8 (emphasis added). Indeed,

"[i]t is well-known that the primary purpose of a residency program is not employment or a stipend, but the academic training and the academic certification for successful completion of the program." *Davis v. Mann*, 882 F.2d 967, 974 (5th Cir. 1989); *see also Mayo I*, 282 F. Supp. 2d at 1017 ("former residents . . . consistently and credibly testified that their purpose in enrolling in a residency program at Mayo was education—to *gain* the knowledge and skill necessary to practice in a specialty area of medicine"). Unlike non-student employees, medical residents "ha[ve] *no* expectation of being hired" at Mayo or the University "upon completion of their programs" and are "not attracted to . . . residency programs because of the stipend" (*Mayo I*, 282 F. Supp. 2d at 1001 n.8, 1017 (emphasis in original))—which is substantially smaller than the amount most doctors will earn upon the completion of their residency programs.

Moreover, when selecting a medical residency program, applicants are unlikely to consider most of the factors relevant to those embarking on a career—salary and benefits, the opportunities for advancement, work hours, job security, and the long-term health of the company. Instead, residency applicants primarily assess a program's "ability to support their further education" through course offerings and mentoring opportunities, as well as the effect of the program's prestige on the career they will begin upon its completion. *Mt. Sinai*, 2008 WL 2940669, at *5 (internal quotation marks omitted).

4. Mayo and the University permit their residents to care for patients purely for *educational* purposes. That educational motive is made clear by several objective indicators—including the accreditation requirements established by the ACGME and the

fact that residents do not provide a net economic benefit to petitioners.

The ACGME only accredits institutions that, like petitioners, "prioritize[] . . . education over service." *Mt. Sinai*, 2008 WL 2940669, at *10. In order to meet the ACGME's "elaborate accreditation scheme" (*McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ.*, 24 F.3d 519, 529-30 (3d Cir. 1994) (Becker, J., concurring)), a residency program is required to establish a comprehensive written curriculum with specified educational goals. Those goals include expanding the residents' medical knowledge and developing their ability to provide patient care, identify and improve weaknesses, and communicate with patients, doctors, and other health care professionals. *See* ACGME, ACGME Common Program Requirements § IV, http://www.acgme.org/acWebsite/dutyhours/dh_dutyhourscommonpr07012007.pdf. In addition, the ACGME limits accreditation to institutions with faculty who engage in scholarly activities and that offer lectures, conferences, laboratory research, and other educational programs that supplement medical residents' clinical experiences. *See Mt. Sinai*, 2008 WL 2940669, at *8; *see also McKeesport Hosp.*, 24 F.3d at 530 (Becker, J., concurring) (noting that the ACGME cited the "lack of scholarly activity" as its first reason for withdrawing accreditation from a medical residency program).

The ACGME also prohibits institutions that sponsor medical residency programs from relying on medical residents for work that lacks educational value. "Sponsoring institutions must provide services and develop systems to minimize the work of residents that is extraneous to their educational programs." *Mt. Sinai*, 2008 WL 2940669, at *9 (internal

quotation marks omitted). As a result, "allied healthcare personnel perform ancillary procedures that have no 'educational value,' such as drawing blood, starting IVs, setting up electrocardiograms, and scheduling tests." *Mayo I*, 282 F. Supp. 2d at 1015.

Thus, while the government has, in the past, attempted to characterize medical residents as "a 'cheap' source of labor," the opposite is true: "Large portions of the patient-care services performed by residents . . . [are] repeated by the supervising staff physicians . . . ultimately responsible for the patients' care." *Mayo I*, 282 F. Supp. 2d at 1015, 1018. The "faculty could easily provide the services in a more efficient and quicker fashion if they didn't have residents, but [faculty] need to train them in the complete spectrum of educational opportunities," including opportunities only available through clinical education. J.A. 31a. In light of these inefficiencies, some institutions that sponsor medical residency programs actually *lose* money due to their training of medical residents. *See, e.g., id.* at 206a-07a (residents at the University are responsible for a net loss of several million dollars each year); *Mayo I*, 282 F. Supp. 2d at 1014 ("on a net basis, the [Mayo] Foundation was spending more on clinical education and research during the years in question than it was receiving from patient care").

Medicare recognizes this net drain on time and resources, and compensates teaching hospitals not only for medical residents' stipends but also for costs attributable to the provision of patient care through inexperienced residents operating under faculty supervision. 42 C.F.R. §§ 412.105, 413.75(a)(1). As the government observed in its briefing below, "Medicare makes grants for Direct Medical Education (DME)

and Indirect Medical Education (IME), which are generally designed to allow hospitals to recoup the direct and indirect costs of *educating* medical residents." J.A. 23a n.2 (emphasis added). The "DME costs include residents' salaries, while IME costs include the higher operating costs of teaching hospitals, such as the cost of any superfluous tests ordered by residents and any redundant services performed." *Id.*

5. Furthermore, the educational program of a medical resident is indistinguishable in nearly all respects from the educational program of third- and fourth-year medical students – whom this Court has already held to be students.

Like a medical residency, the final two years of medical school consist of "generally all clinical experiences." J.A. 189a; *see also Mt. Sinai*, 2008 WL 2940669, at *5 (a medical school student's final two years "are quite analogous to what happens for the period of residency training") (internal quotation marks omitted). In addition to hands-on training, both medical residents and third- and fourth-year medical students receive reading assignments, conduct research, attend lectures, and take exams. *See* Pet. App. 41a n.10, 63a, 64a n.17; *Mayo I*, 282 F. Supp. 2d at 1004; *Mt. Sinai*, 2008 WL 2940669, at *7.

This Court has held that individuals in their third- and fourth-year of medical school are students. In *Board of Curators v. Horowitz*, 435 U.S. 78 (1978), the Court concluded that an individual in her final year of medical school was not denied due process despite being dismissed from a state school without a full hearing, because "[a]cademic evaluations of a *student* . . . bear little resemblance to the judicial and administrative factfinding proceedings to which [the

Court] ha[s] traditionally attached a full-hearing requirement." *Id.* at 89. Notably, the plaintiff was deemed to be a "student" dismissed for "academic" reasons even though she "was dismissed because she was . . . deficient in her *clinical work*." *Id.* at 95 (Powell, J., concurring) (emphasis added). "Evaluation of [a medial student's] performance in [clinical work] is no less an 'academic' judgment because it involves observation of her skills and techniques in actual conditions of practice, rather than assigning a grade to her written answers on an essay question." *Id.*; *see also Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 215 (1985) (classifying as "student[s]" individuals engaged in "clinical training at hospitals affiliated with [a] University" during the final two years of medical school).

Courts have recognized that the "same factors that justified minimal procedural protections in the *Horowitz* medical school context apply with equal force to the paid residency situation." *Davis*, 882 F.2d at 974. Like nonresident students, residents who are performing poorly and not making sufficient progress may be dismissed from their program. *See Ross v. Univ. of Minn.*, 439 N.W.2d 28, 33 (Minn. Ct. App. 1989). When that occurs, the due process rights guaranteed to non-student public employees are inapplicable to medical residents dismissed from public universities because medical residents are entitled only to "the minimum procedural protections owed in cases of student dismissal." *Shaboon v. Duncan*, 252 F.3d 722, 731 (5th Cir. 2001). "The decision to terminate a resident from a hospital-based residency program is the same as any other decision to fail a graduate student for inability to meet academic requirements." *Ross*, 439 N.W.2d at 33; *see also Sarkissian v. W. Va. Univ. Bd. of Governors*, 2008 WL

901722, at *2 (N.D. W. Va. Mar. 31, 2008) (rejecting an expelled medical resident's due process claim because the resident shared the rights of medical students, who lack a due process interest in continuing their medical education), *aff'd*, 332 F. App'x 113 (4th Cir. 2009).

6. Finally, medical residents are widely classified as students—by Congress, accrediting organizations, and numerous courts—and medical residents consider themselves students.

Most importantly, Congress itself has repeatedly referred to medical residents as students. *See* 5 U.S.C. § 5102 (referring to medical "residents-in-training ... and *other* student employees"); *id.* § 5351 ("'student-employee' means ... resident-in-training"); 15 U.S.C. § 37b(b)(1)(D) ("[t]he term 'student' means any individual who seeks to be admitted to a graduate medical education program" such as a medical residency program).

Moreover, it is undisputed that medical residents at Mayo and the University believe that, "as a resident, you're a student." J.A. 80a; *see also id.* at 102a ("I believe myself to be a student ... [b]ecause my primary purpose in residency was to learn."); *id.* at 125a ("Q: When you were in the residency program, were you a student at the University of Minnesota? A: Yes."). Faculty and administrators share that understanding. As one staff surgeon explained, "if you talk to any staff surgeon at this site, residents are students. They're students learning an art, they're students learning some wisdom, they're students learning techniques, and that's why they're here, because we're simply educating them." *Id.* at 70a; *see also id.* at 156a-57a (testimony from residency coordinator that "I believe [residents] have

student status . . . [b]ecause I believe their activities are educational. I believe their rotations can be likened to courses. I believe this is the necessary education they need to be able to become practicing physicians.").

Similarly, the ACGME has declared unequivocally that "residents are students." ACGME, ACGME Duty Hours Standards Fact Sheet, http://www.acgme.org/acWebsite/newsRoom/newsRm_dutyHours.asp; *see also* ACGME, Institutional Review Committee, http://www.acgme.org/acWebsite/irc/extreme_emergent_faq.asp (same).

Courts have been equally clear about the student status of medical residents. Four circuits have held that medical residents enrolled and regularly attending classes at a sponsoring institution unambiguously qualify for the Student Exemption. *See Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 27; *Detroit Med. Ctr.*, 557 F.3d at 417-18; *Univ. of Chi. Hosps.*, 545 F.3d at 567; *Mt. Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d at 1251-56; *see also Minnesota v. Apfel*, 151 F.3d 742, 748 (8th Cir. 1998) (same); *Ctr. for Family Med.*, 2008 WL 3245460, at *8-11; *Mt. Sinai*, 2008 WL 2940669, at *36; *Mayo I*, 282 F. Supp. 2d at 1015-18; *Chater*, 1997 WL 33352908, at *10. Indeed, before the decision below, *no* court of appeals had reached a contrary conclusion.[2]

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[2] Moreover, outside the context of the Student Exemption, courts have repeatedly affirmed that a medical resident "must be viewed as a student." *Ross*, 439 N.W.2d at 33; *see also Pierce v. Smith*, 117 F.3d 866, 874 (5th Cir. 1997) (calling a medical resident "both a student and an employee"); *McKeesport Hosp.*, 24 F.3d at 522 (referring to a medical residency program's "faculty and students"); *Davis*, 882 F.2d at 974 ("the primary purpose of a residency program is . . . the academic training and

* * *

In light of the clear educational purpose of the medical residency programs at Mayo and the University, petitioners' medical residents unambiguously fall within the plain meaning of the term "student" in FICA's Student Exemption. The full-time employee regulation's categorical exclusion of *all* medical residents from the statutory exemption is therefore invalid because it contravenes "the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843.

II. The Categorical Exclusion Of Petitioners' Medical Residents From The Student Exemption Is Arbitrary And Unreasonable.

Even if the statutory term "student" did not unambiguously encompass petitioners' medical residents, the Treasury Department's categorical exclusion of all medical residents and other full-time em-

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[Footnote continued from previous page]

the academic certification"); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988) (holding that a medical resident "was both an employee and a student"); *Halverson v. Univ. of Utah Sch. of Med.*, 2007 WL 2892633, at *11 (D. Utah Sept. 28, 2007) (holding that medical residents' due process rights are limited to those of "other medical students"); *Fenje v. Feld*, 301 F. Supp. 2d 781, 801 (N.D. Ill. 2003) ("the resident is both a student and an employee"), *aff'd*, 398 F.3d 620 (7th Cir. 2005); *Baldwin v. Univ. of Texas Med. Branch*, 945 F. Supp. 1022, 1028 (S.D. Tex.) (calling a medical resident "significantly behind the other students at her level"), *aff'd*, 122 F.3d 1066 (5th Cir. 1996); *Gul v. Ctr. for Family Med.*, 762 N.W.2d 629, 636 (S.D. 2009) ("medical residents are students").

ployees from the Student Exemption would still be arbitrary and unreasonable. The full-time employee regulation arbitrarily excludes individuals from the Student Exemption based on the *amount* of time they spend learning, not based on whether they are in fact pursuing a course of study. And, the regulation fails to satisfy *any* of the factors that indicate the reasonableness of a tax regulation under this Court's decisions in *Chevron* and *National Muffler*.

A. The Full-Time Employee Regulation Is Arbitrary.

The distinction that the full-time employee regulation draws between full-time employees and employees who work less than forty hours a week is blatantly arbitrary.

In determining whether an individual is a student, the relevant issue is *what* the person does and *why*—not *how long* the person does it. *See Oxford Universal Dictionary*, *supra*, at 2049-50 (defining a student as someone who engages in "study"); *Webster's New International Dictionary*, *supra*, at 2502 (same); *see also Detroit Med. Ctr.*, 557 F.3d at 417-18 ("To determine whether the doctors in Detroit Medical's residency program are students, we . . . need to know what the residents in the program do and under what circumstances."). If the purpose of an activity is "the acquisition of learning" (*Oxford Universal Dictionary*, *supra*, at 2049-50), then spending a large amount of time on the activity does not make the person who engages in it any less of a student than someone who undertakes the activity for only a short period of time. To the contrary, the more time one spends engaged in learning, the more reason there is to deem that person a student.

The arbitrary nature of the full-time employee regulation is underscored by its insupportable distinction between students who learn through hands-on training and students who learn through classroom instruction and textbooks. The full-time employee regulation irrationally divides individuals engaged in learning into two groups—those who are deemed eligible for the Student Exemption (regardless of the number of hours they study) because they primarily engage in "study . . . by means of books," and those, like medical residents, who are deemed ineligible for the Exemption merely because they primarily "study . . . by means of . . . observation[ ]" and hands-on training for more than forty hours a week. *Oxford Universal Dictionary*, *supra*, at 2049-50. That artificial distinction has no basis in the statutory text, in the realities of contemporary graduate education, or in common sense.

Only through the most arbitrary reasoning is it possible to exclude medical residents—who are pursuing their graduate medical education through a rigorous program of hands-on learning, lectures, and research—from the definition of "student" simply because residents pursue their education for long hours and do so predominantly in a clinical setting. Indeed, there is no question that the Treasury Department could not adopt a rule that purported to exclude from the Student Exemption individuals who are engaged in library research for more than forty hours per week. *See* Rev. Rul. 78-17, 1978-1 C.B. 306 (advanced graduate student no longer attending classroom courses qualifies as a student). The full-time employee regulation is no less arbitrary and irrational.

B. The Full-Time Employee Regulation Is Unreasonable.

In determining the reasonableness of a regulation interpreting a revenue statute, this Court has given special consideration to several factors identified in *National Muffler*. *See* 440 U.S. at 477; *Cottage Sav. Ass'n*, 499 U.S. at 560-61 (considering the validity of a tax regulation under *National Muffler*); *see also Boeing Co. v. United States*, 537 U.S. 437, 448 (2003); *Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 387-89 (1998). In *National Muffler*, the Court looked first "to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose." 440 U.S. at 477. Second, it explained that "a regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent." *Id.* Third, "[i]f the regulation dates from a later period, the manner in which it evolved merits inquiry." *Id.* "[O]ther relevant considerations" include "the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent reenactments of the statute." *Id.*

Each of these factors demonstrates that the full-time employee regulation is an unreasonable interpretation of the Student Exemption.

1. In addition to conflicting with the plain language of the Student Exemption (*see supra* Part I), the full-time employee regulation cannot be harmonized with the Exemption's origin or purpose. This is so for at least two reasons. First, Congress's decision in 1950 to combine two tax exemptions for stu-

dents—one that limited eligibility based on the amount of remuneration and one that did not—into a single exemption that includes no limitation on remuneration manifests an intent to exclude from FICA taxation *all* students enrolled and regularly attending classes, regardless of whether they are receiving remuneration for full-time employment. Second, the purpose of FICA is to assess taxation during a worker's career in order to fund the worker's Social Security benefits. Medical residents, however, are not permitted to begin their professional careers until they have completed their residency programs. In fact, there is some question as to whether medical residents are even eligible to receive Social Security benefits.

a. The full-time employee regulation disregards the Student Exemption's legislative origin.

In 1939, Congress enacted two FICA exemptions for students. One exempted students employed by tax-exempt schools. Pub. L. No. 76-379, § 1426(b)(10)(A)(iii), 53 Stat. 1360, 1374 (1939). The other exempted students at schools that were not tax-exempt so long as the student received less than $45 in pay per quarter. *Id.* § 1426(b)(10)(A)(i). Congress thus intended students at tax-exempt schools (like petitioners) to qualify for the Student Exemption, whether or not they worked enough hours to earn comparatively large amounts of money. Recognizing this congressional intent, the Treasury Department adopted regulations providing that, for "a student who is enrolled and is regularly attending classes at a [tax-exempt] school, college, or university, . . . the amount of remuneration for services performed by the employee" is "*immaterial*" to eligibility for the Student Exemption. Treas. Reg. § 402.217(d), 5 Fed. Reg. 785 (Feb. 27, 1940) (emphasis added).

Then, in 1950, Congress *eliminated* the remuneration limit for students at tax-paying schools and combined the two exemptions into a single statutory provision. Pub. L. No. 81-734, § 1426(b)(11)(B), 64 Stat. 477, 531 (1950). Congress thereby exempted *all* qualifying students from FICA taxation, and refused to limit the Student Exemption based on the amount of money earned or the quantity of time spent earning that money. *Id.*; *see also Chater*, 1997 WL 33352908, at *9 (the 1950 "amendment further supports the determination that the amount of remuneration received by an individual is immaterial to a determination of whether said individual qualifies for the student exemption").

The legislative history confirms that Congress intended the Student Exemption to apply beyond part-time work for nominal wages to full-time work by students employed by their schools. The House and Senate Reports that accompanied the 1939 enactment of the Student Exemption explained that service would be exempted from taxation if its compensation "does not exceed $45 . . . *or* . . . without regard to amount of remuneration, if service is performed by a student enrolled and regularly attending classes at a school, college, or university." H.R. Rep. No. 728, 76th Cong., 1st Sess. (1939), *reprinted in* 1939-2 C.B. 538, 550 (emphasis added); *see also* S. Rep. No. 76-734, 76th Cong., 1st Sess. (1939), *reprinted in* 1939-2 C.B. 565, 577. Similarly, the House and Senate Reports accompanying the 1950 amendments explained that the Student Exemption covers "service performed for nominal amounts in the employ of tax-exempt nonprofit organizations . . . *and* service performed by students in the employ of colleges and universities." H.R. Rep. No. 1300, 81st Cong., 1st Sess. (1949), *reprinted in* 1950-2 C.B. 255,

260 (emphasis added); *see also* S. Rep. No. 81-1669, 81st Cong., 2nd Sess. (1950), *reprinted in* 1950-2 C.B. 302, 308 (same).

b. The full-time employee regulation also conflicts with the underlying purposes of FICA and the Student Exemption.

As the government conceded below, "FICA's purpose [is] requiring contributions to support coverage garnered during a worker's *career*." J.A. 23a (emphasis added). Doctors' careers do not begin, however, until they complete their medical residency programs and become board-certified in a specialty, because doctors without certification in a specialty generally "have no possibility of obtaining hospital privileges." *Mt. Sinai*, 2008 WL 2940669, at *3 n.6. It would be flatly inconsistent with FICA's purposes to tax individuals who have not yet embarked on their careers.

Indeed, while FICA requires contributions to support an employee's Social Security coverage, the full-time employee regulation imposes FICA taxation on employees who may not even be eligible to receive Social Security benefits. A longstanding Social Security Administration regulation interpreting a provision of the Social Security Act identical to the Student Exemption states that "[w]hether you are a student for purposes of this section depends on your relationship with your employer. If your main purpose is pursuing a course of study rather than earning a livelihood, we consider you to be a student and your work is not considered employment" for the purposes of earning Social Security benefits. 20 C.F.R. § 404.1028(c). When a substantially identical regulation was in place for FICA purposes, numerous courts held that medical residents were students.

See Apfel, 151 F.3d at 748; *Ctr. for Family Med. v. United States*, 2008 WL 3245460, at *8-11; *Mt. Sinai*, 2008 WL 2940669, at *36; *Mayo I*, 282 F. Supp. 2d at 1015-18; *Chater*, 1997 WL 33352908, at *10. If the Social Security regulation is interpreted in the same manner, medical residents will be subject to FICA taxation under the full-time employee regulation but will not earn Social Security benefit credits.

Such an anomaly is inconsistent with Congress's purpose of requiring FICA contributions to fund benefits earned by the taxpayer. Even the Treasury Department acknowledged in its explanation of the full time employee regulation that the "integrity" of the Social Security system requires "symmetry" in the definitions of employment for benefits and taxation purposes, because, "[e]xcept in unusual circumstances, the Social Security Act, and the Internal Revenue FICA provisions, are to be read in pari materia." 69 Fed. Reg. 8,604, 8,605 (Feb. 25, 2004) (citing *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001)); *see also Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981) (holding that regulations defining "wages" differently for Social Security and unemployment tax purposes than for income tax withholding purposes were invalid because they "fail[ed] to implement the congressional mandate in a consistent and reasonable manner"). Such symmetry is impossible where medical residents are required to pay FICA taxes on employment that may not render them eligible for Social Security benefits.

2. Moreover, while "[a] regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent" (*Nat'l Muffler*, 440 U.S. at 477), the full-time employee regula-

tion was promulgated sixty-five years *after* the enactment of the Student Exemption. In fact, the Treasury Department's "contemporaneous construction of the statute" occurred in 1940 (Treas. Reg. § 31.3121(b)(10)-2(c) (2004)), when it promulgated regulations that the government has now conceded *permit* medical residents to qualify for the Student Exemption. *See* Br. in Opp. 14 n.2 (the Internal Revenue Service now "accept[s] the position . . . that medical residents are exempt from FICA taxes for tax periods covered by the prior regulations"). Those "presumed to have been aware of congressional intent" thus interpreted the Student Exemption to apply to medical residents. *Nat'l Muffler*, 440 U.S. at 477.

3. Because the full-time employee regulation "dates from a later period" than the Student Exemption, "the manner in which it evolve[d] merits inquiry" and further supports the conclusion that the regulation is unreasonable. *Nat'l Muffler*, 440 U.S. at 477.

The Treasury Department does not even claim to have adopted the new regulation to reflect evolving judicial authority or to apply general legal principles to new fact patterns. Instead, the Treasury Department acknowledged that the specific purpose of the new regulation was to overturn judicial decisions applying the Student Exemption to medical residents—and to do so without the need for seeking a statutory amendment from Congress. *See* 69 Fed. Reg. at 8605 ("additional clarification" of the term "student" is required in light of *Apfel*); J.A. 219a ("the regulation was amended partly in response to the recent wave of litigation concerning the status of medical residents as 'students'"). While agencies are not foreclosed from responding to adverse judicial decisions

through the regulatory process, the fact that the full-time employee regulation was avowedly promulgated for this result-oriented purpose further suggests that the Department was blinded by its own policy preferences when it adopted the regulation.

4. Among "[o]ther relevant considerations" in determining a regulation's reasonableness "are the length of time the regulation has been in effect, the reliance placed on it, . . . and the degree of scrutiny Congress has devoted to the regulation." *Nat'l Muffler*, 440 U.S. at 477. Each of these factors also weighs strongly in favor of invalidating the full-time employee regulation.

The full-time employee regulation has been in effect for only five years, has not been the subject of congressional consideration, and has not produced any significant reliance by taxpayers. Indeed, far from relying on the regulation, petitioners immediately challenged the regulation's validity in tax-refund actions. Those suits continued the twenty years of legal uncertainty surrounding the application of the Student Exemption to medical residents. Only after this Court authoritatively resolves the question in this case will schools, residents, and the Treasury Department have a stable regulatory backdrop on which to place reasonable reliance.

5. The absence of "consistency of the Commissioner's interpretation" is another "relevant consideration[ ]" that further underscores the unreasonableness of the full-time employee regulation. *Nat'l Muffler*, 440 U.S. at 477.

The government began collecting Social Security contributions from the University's non-student employees in 1955 but did not attempt to collect contributions from the stipends paid to the school's medi-

cal residents for the next thirty-one years. *Apfel*, 151 F.3d at 744. *But see* State and Local Coverage—Commissioner's Ruling—Monies Paid by a Hospital to a Resident Doctor—Arizona, SSR 78-3, 1978 WL 14050 (concluding that residents' "services were not excluded from coverage under the student exclusion"). Then, in 1989, the government triggered a now two-decades-old legal dispute by adopting the position that medical residents are categorically ineligible for the Student Exemption. *Apfel*, 151 F.3d at 744, 747-48.

Even as the government was pressing that categorical position in litigation, however, the Treasury Department was suggesting in administrative pronouncements that medical residents could be "students" under some circumstances. *See* Rev. Proc. 98-16, 1998-1 C.B. 403 (explaining that "the services performed by [medical residents] cannot be *assumed* to be incidental to and for the purpose of pursuing a course of study") (emphasis added); IRS CCA 200212029 (Jan. 24, 2002) ("whether medical residents are students depends upon the facts and circumstances in each case"); IRS CCA 200029030 (Apr. 19, 2000) (same). After its categorical litigating position proved unsuccessful, the Treasury Department promulgated the full-time employee regulation. Shortly thereafter, the Department conceded that residents *did* in fact qualify for the Student Exemption under the regulations adopted in 1940 and in place until 2005. *See* Br. in Opp. 14 n.2.

Because "an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view" (*Thomas Jefferson Univ.*, 512 U.S. at 515 (internal quotation marks omitted)), the full-time employee regulation is inher-

ently suspect and should be subjected to exacting judicial scrutiny. That scrutiny is fatal to the regulation because the language, origin, and purpose of the Student Exemption—together with the absence of *any* factor supporting the regulation's validity—leave no doubt that the full-time employee regulation is patently unreasonable.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX A

26 U.S.C. § 3121 provides in relevant part:

§ 3121. Definitions.

(a) Wages.—For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash

* * *

(b) Employment.—For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 233 of the

Social Security Act; except that such term shall not include—

* * *

(10) service performed in the employ of—

(A) a school, college, or university, or

(B) an organization described in section 509(a)(3) if the organization is organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university and is operated, supervised, or controlled by or in connection with such school, college, or university, unless it is a school, college, or university of a State or a political subdivision thereof and the services performed in its employ by a student referred to in section 218(c)(5) of the Social Security Act are covered under the agreement between the Commissioner of Social Security and such State entered into pursuant to section 218 of such Act;

if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university;

* * *

APPENDIX B

Treasury Regulations on Employment Tax (26 C.F.R.), as in effect for services performed prior to April 1, 2005:

§ 31.3121(b)(10)-2. Services performed by certain students in the employ of a school, college, or university, or of a nonprofit organization auxiliary to a school, college, or university.—

(a)(1) Services performed in the employ of a school, college, or university (whether or not such organization is exempt from income tax) is excepted from employment, if the services are performed by a student who is enrolled and is regularly attending classes at such school, college, or university.

* * *

(b) For purposes of this exception, the amount of remuneration for services performed by the employee in the calendar quarter, the type of services performed by the employee, and the place where the services are performed are immaterial. The statutory tests are (1) the character of the organization in the employ of which the services are performed as a school, college, or university, * * * and (2) the status of the employee as a student enrolled and regularly attending classes at the school, college, or university by which he is employed or with which his employer is affiliated.

(c) The status of the employee as a student performing the services shall be determined on the

basis of the relationship of such employee with the organization for which the services are performed. An employee who performs services in the employ of a school, college, or university, as an incident to and for the purpose of pursuing a course of study at such school, college, or university has the status of a student in the performance of such services.

* * *

(d) The term "school, college, or university" within the meaning of this exception is to be taken in its commonly or generally accepted sense.

* * *

APPENDIX C

Treasury Regulations on Employment Tax (26 C.F.R.), as in effect for services performed on or after April 1, 2005:

§ 31.3121(b)(10)-2. Services performed by certain students in the employ of a school, college, or university, or of a nonprofit organization auxiliary to a school, college, or university.—

(a) General rule. (1) Services performed in the employ of a school, college, or university within the meaning of paragraph (c) of this section (whether or not the organization is exempt from income tax) are excepted from employment, if the services are performed by a student within the meaning of paragraph (d) of this section who is enrolled and is regularly attending classes at the school, college, or university.

(2) Services performed in the employ of an organization which is—

(i) Described in section 509(a)(3) and § 1.509(a)-4;

(ii) Organized, and at all times thereafter operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university within the meaning of paragraph (c) of this section; and

(iii) Operated, supervised, or controlled by or in connection with the school, college, or university; are excepted from employment, if the services are

performed by a student who is enrolled and regularly attending classes within the meaning of paragraph (d) of this section at the school, college, or university. The preceding sentence shall not apply to services performed in the employ of a school, college, or university of a State or a political subdivision thereof by a student referred to in section 218(c)(5) of the Social Security Act (42 U.S.C. 418(c)(5)) if such services are covered under the agreement between the Commissioner of Social Security and such State entered into pursuant to section 218 of such Act. For the definitions of "operated, supervised, or controlled by", "supervised or controlled in connection with", and "operated in connection with", see paragraphs (g), (h), and (i), respectively, of § 1.509(a)-4.

(b) Statutory tests. For purposes of this section, if an employee has the status of a student within the meaning of paragraph (d) of this section, the amount of remuneration for services performed by the employee, the type of services performed by the employee, and the place where the services are performed are not material. The statutory tests are:

(1) The character of the organization in the employ of which the services are performed as a school, college, or university within the meaning of paragraph (c) of this section, or as an organization described in paragraph (a)(2) of this section, and

(2) The status of the employee as a student enrolled and regularly attending classes within the meaning of paragraph (d) of this section at the school, college, or university within the meaning of paragraph (c) of this section by which the employee is employed or with which the employee's employer is

affiliated within the meaning of paragraph (a)(2) of this section.

(c) School, College, or University. An organization is a school, college, or university within the meaning of section 3121(b)(10) if its primary function is the presentation of formal instruction, it normally maintains a regular faculty and curriculum, and it normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on. See section 170(b)(1)(A)(ii) and the regulations thereunder.

(d) Student Status—general rule. Whether an employee has the status of a student performing the services shall be determined based on the relationship of the employee with the organization employing the employee. In order to have the status of a student, the employee must perform services in the employ of a school, college, or university within the meaning of paragraph (c) of this section at which the employee is enrolled and regularly attending classes in pursuit of a course of study within the meaning of paragraphs (d)(1) and (2) of this section. In addition, the employee's services must be incident to and for the purpose of pursuing a course of study within the meaning of paragraph (d)(3) of this section at such school, college, or university. An employee who performs services in the employ of an affiliated organization within the meaning of paragraph (a)(2) of this section must be enrolled and regularly attending classes at the affiliated school, college, or university within the meaning of paragraph (c) of this section in pursuit of a course of study within the meaning of paragraphs (d)(1) and (2) of this section. In addition, the employee's services must be incident to and for the purpose of

pursuing a course of study within the meaning of paragraph (d)(3) of this section at such school, college, or university.

(1) Enrolled and regularly attending classes. An employee must be enrolled and regularly attending classes at a school, college, or university within the meaning of paragraph (c) of this section at which the employee is employed to have the status of a student within the meaning of section 3121(b)(10). An employee is enrolled within the meaning of section 3121(b)(10) if the employee is registered for a course or courses creditable toward an educational credential described in paragraph (d)(2) of this section. In addition, the employee must be regularly attending classes to have the status of a student. For purposes of this paragraph (d)(1), a class is an instructional activity led by a faculty member or other qualified individual hired by the school, college, or university within the meaning of paragraph (c) of this section for identified students following an established curriculum. Traditional classroom activities are not the sole means of satisfying this requirement. For example, research activities under the supervision of a faculty advisor necessary to complete the requirements for a Ph.D. degree may constitute classes within the meaning of section 3121(b)(10). The frequency of these and similar activities determines whether an employee may be considered to be regularly attending classes.

(2) Course of study. An employee must be pursuing a course of study in order to have the status of a student. A course of study is one or more courses the completion of which fulfills the requirements necessary to receive an educational credential granted by a school, college, or university

within the meaning of paragraph (c) of this section. For purposes of this paragraph, an educational credential is a degree, certificate, or other recognized educational credential granted by an organization described in paragraph (c) of this section. A course of study also includes one or more courses at a school, college or university within the meaning of paragraph (c) of this section the completion of which fulfills the requirements necessary for the employee to sit for an examination required to receive certification by a recognized organization in a field.

(3) Incident to and for the purpose of pursuing a course of study.

(i) General rule. An employee's services must be incident to and for the purpose of pursuing a course of study in order for the employee to have the status of a student. Whether an employee's services are incident to and for the purpose of pursuing a course of study shall be determined on the basis of the relationship of the employee with the organization for which such services are performed as an employee. The educational aspect of the relationship between the employer and the employee, as compared to the service aspect of the relationship, must be predominant in order for the employee's services to be incident to and for the purpose of pursuing a course of study. The educational aspect of the relationship is evaluated based on all the relevant facts and circumstances related to the educational aspect of the relationship. The service aspect of the relationship is evaluated based on all the relevant facts and circumstances related to the employee's employment. The evaluation of the service aspect of the relationship is not affected by the fact that the services performed by the employee may have an educational, instructional, or training

aspect. Except as provided in paragraph (d)(3)(iii) of this section, whether the educational aspect or the service aspect of an employee's relationship with the employer is predominant is determined by considering all the relevant facts and circumstances. Relevant factors in evaluating the educational and service aspects of an employee's relationship with the employer are described in paragraphs (d)(3)(iv) and (v) of this section respectively. There may be facts and circumstances that are relevant in evaluating the educational and service aspects of the relationship in addition to those described in paragraphs (d)(3)(iv) and (v) of this section.

(ii) Student status determined with respect to each academic term. Whether an employee's services are incident to and for the purpose of pursuing a course of study is determined separately with respect to each academic term. If the relevant facts and circumstances with respect to an employee's relationship with the employer change significantly during an academic term, whether the employee's services are incident to and for the purpose of pursuing a course of study is reevaluated with respect to services performed during the remainder of the academic term.

(iii) Full-time employee. The services of a full-time employee are not incident to and for the purpose of pursuing a course of study. The determination of whether an employee is a full-time employee is based on the employer's standards and practices, except regardless of the employer's classification of the employee, an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee. An employee's normal work schedule is not affected by increases in hours worked caused by work demands unforeseen at

the start of an academic term. However, whether an employee is a full-time employee is reevaluated for the remainder of the academic term if the employee changes employment positions with the employer. An employee's work schedule during academic breaks is not considered in determining whether the employee's normal work schedule is 40 hours or more per week. The determination of an employee's normal work schedule is not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect.

(iv) Evaluating educational aspect. The educational aspect of an employee's relationship with the employer is evaluated based on all the relevant facts and circumstances related to the educational aspect of the relationship. The educational aspect of an employee's relationship with the employer is generally evaluated based on the employee's course workload. Whether an employee's course workload is sufficient in order for the employee's employment to be incident to and for the purpose of pursuing a course of study depends on the particular facts and circumstances. A relevant factor in evaluating an employee's course workload is the employee's course workload relative to a full-time course workload at the school, college or university within the meaning of paragraph (c) of this section at which the employee is enrolled and regularly attending classes.

(v) Evaluating service aspect. The service aspect of an employee's relationship with the employer is evaluated based on the facts and circumstances related to the employee's employment. Services of an employee with the status of a full-time employee within the meaning of paragraph (d)(3)(iii) of this section are not incident to and for the purpose of pursuing a course of study. Relevant factors in

evaluating the service aspect of an employee's relationship with the employer are described in paragraphs (d)(3)(v)(A), (B), and (C) of this section.

(A) Normal work schedule and hours worked. If an employee is not a full-time employee within the meaning of paragraph (d)(3)(iii) of this section, then the employee's normal work schedule and number of hours worked per week are relevant factors in evaluating the service aspect of the employee's relationship with the employer. As an employee's normal work schedule or actual number of hours worked approaches 40 hours per week, it is more likely that the service aspect of the employee's relationship with the employer is predominant. The determination of an employee's normal work schedule and actual number of hours worked is not affected by the fact that some of the services performed by the employee may have an educational, instructional, or training aspect.

(B) Professional employee.

(1) If an employee has the status of a professional employee, then that suggests the service aspect of the employee's relationship with the employer is predominant. A professional employee is an employee—

(i) Whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education, from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes;

(ii) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(iii) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(2) Licensed, professional employee. If an employee is a licensed, professional employee, then that further suggests the service aspect of the employee's relationship with the employer is predominant. An employee is a licensed, professional employee if the employee is required to be licensed under state or local law to work in the field in which the employee performs services and the employee is a professional employee within the meaning of paragraph (d)(3)(v)(B)(1) of this section.

(C) Employment Benefits. Whether an employee is eligible to receive one or more employment benefits is a relevant factor in evaluating the service aspect of an employee's relationship with the employer. For example, eligibility to receive vacation, paid holiday, and paid sick leave benefits; eligibility to participate in a retirement plan or arrangement described in sections 401(a), 403(b), or 457(a); or eligibility to receive employment benefits such as reduced tuition (other than qualified tuition reduction under section 117(d)(5) provided to a teaching or research assistant who is a graduate student), or benefits under sections 79 (life insurance), 127 (qualified educational assistance), 129 (dependent care assistance programs), or 137 (adoption assistance) suggest that the service aspect of an employee's relationship with the employer is

predominant. Eligibility to receive health insurance employment benefits is not considered in determining whether the service aspect of an employee's relationship with the employer is predominant. The weight to be given the fact that an employee is eligible for a particular employment benefit may vary depending on the type of benefit. For example, eligibility to participate in a retirement plan is generally more significant than eligibility to receive a dependent care employment benefit. Additional weight is given to the fact that an employee is eligible to receive an employment benefit if the benefit is generally provided by the employer to employees in positions generally held by non-students. Less weight is given to the fact that an employee is eligible to receive an employment benefit if eligibility for the benefit is mandated by state or local law.

(e) Examples. The following examples illustrate the principles of paragraphs (a) through (d) of this section:

Example 1. (i) Employee C is employed by State University T to provide services as a clerk in T's administrative offices, and is enrolled and regularly attending classes at T in pursuit of a B.S. degree in biology. C has a course workload during the academic term which constitutes a full-time course workload at T. C is considered a part-time employee by T during the academic term, and C's normal work schedule is 20 hours per week, but occasionally due to work demands unforeseen at the start of the academic term C works 40 hours or more during a week. C is compensated by hourly wages, and receives no other compensation or employment benefits.

(ii) In this example, C is employed by T, a school, college, or university within the meaning of paragraph (c) of this section. C is enrolled and regularly attending classes at T in pursuit of a course of study. C is not a full-time employee based on T's standards, and C's normal work schedule does not cause C to have the status of a full-time employee, even though C may occasionally work 40 hours or more during a week due to unforeseen work demands. C's part-time employment relative to C's full-time course workload indicates that the educational aspect of C's relationship with T is predominant. Additional facts supporting this conclusion are that C is not a professional employee, and C does not receive any employment benefits. Thus, C's services are incident to and for the purpose of pursuing a course of study. Accordingly, C's services are excepted from employment under section 3121(b)(10).

Example 2. (i) Employee D is employed in the accounting department of University U, and is enrolled and regularly attending classes at U in pursuit of an M.B.A. degree. D has a course workload which constitutes a half-time course workload at U. D is considered a full-time employee by U under U's standards and practices.

(ii) In this example, D is employed by U, a school, college, or university within the meaning of paragraph (c) of this section. In addition, D is enrolled and regularly attending classes at U in pursuit of a course of study. However, because D is considered a full-time employee by U under its standards and practices, D's services are not incident to and for the purpose of pursuing a course of study. Accordingly, D's services are not excepted from employment under section 3121(b)(10).

Example 3. (i) The facts are the same as in Example 2, except that D is not considered a full-time employee by U, and D's normal work schedule is 32 hours per week. In addition, D's work is repetitive in nature and does not require the consistent exercise of discretion and judgment, and is not predominantly intellectual and varied in character. However, D receives vacation, sick leave, and paid holiday employment benefits, and D is eligible to participate in a retirement plan maintained by U described in section 401(a).

(ii) In this example, D's half-time course workload relative to D's hours worked and eligibility for employment benefits indicates that the service aspect of D's relationship with U is predominant, and thus D's services are not incident to and for the purpose of pursuing a course of study. Accordingly, D's services are not excepted from employment under section 3121(b)(10).

Example 4. (i) Employee E is employed by University V to provide patient care services at a teaching hospital that is an unincorporated division of V. These services are performed as part of a medical residency program in a medical specialty sponsored by V. The residency program in which E participates is accredited by the Accreditation Counsel for Graduate Medical Education. Upon completion of the program, E will receive a certificate of completion, and be eligible to sit for an examination required to be certified by a recognized organization in the medical specialty. E's normal work schedule, which includes services having an educational, instructional, or training aspect, is 40 hours or more per week.

(ii) In this example, E is employed by V, a school, college, or university within the meaning of paragraph (c) of this section. However, E's normal work schedule calls for E to perform services 40 or more hours per week. E is therefore a full-time employee, and the fact that some of E's services have an educational, instructional, or training aspect does not affect that conclusion. Thus, E's services are not incident to and for the purpose of pursuing a course of study. Accordingly, E's services are not excepted from employment under section 3121(b)(10) and there is no need to consider other relevant factors, such as whether E is a professional employee or whether E is eligible for employment benefits.

Example 5. (i) Employee F is employed in the facilities management department of University W. F has a B.S. degree in engineering, and is completing the work experience required to sit for an examination to become a professional engineer eligible for licensure under state or local law. F is not attending classes at W.

(ii) In this example, F is employed by W, a school, college, or university within the meaning of paragraph (c) of this section. However, F is not enrolled and regularly attending classes at W in pursuit of a course of study. F's work experience required to sit for the examination is not a course of study for purposes of paragraph (d)(2) of this section. Accordingly, F's services are not excepted from employment under section 3121(b)(10).

Example 6. (i) Employee G is employed by Employer X as an apprentice in a skilled trade. X is a subcontractor providing services in the field in which G wishes to specialize. G is pursuing a certificate in the skilled trade from Community

College C. G is performing services for X pursuant to an internship program sponsored by C under which its students gain experience, and receive credit toward a certificate in the trade.

(ii) In this example, G is employed by X. X is not a school, college or university within the meaning of paragraph (c) of this section. Thus, the exception from employment under section 3121(b)(10) is not available with respect to G's services for X.

Example 7. (i) Employee H is employed by a cosmetology school Y at which H is enrolled and regularly attending classes in pursuit of a certificate of completion. Y's primary function is to carry on educational activities to prepare its students to work in the field of cosmetology. Prior to issuing a certificate, Y requires that its students gain experience in cosmetology services by performing services for the general public on Y's premises. H is scheduled to work and in fact works significantly less than 30 hours per week. H's work does not require knowledge of an advanced type in a field of science or learning, nor is it predominantly intellectual and varied in character. H receives remuneration in the form of hourly compensation from Y for providing cosmetology services to clients of Y, and does not receive any other compensation and is not eligible for employment benefits provided by Y.

(ii) In this example, H is employed by Y, a school, college or university within the meaning of paragraph (c) of this section, and is enrolled and regularly attending classes at Y in pursuit of a course of study. Factors indicating the educational aspect of H's relationship with Y is predominant are that H's hours worked are significantly less than 30 per week, H is not a professional employee, and H is

not eligible for employment benefits. Based on the relevant facts and circumstances, the educational aspect of H's relationship with Y is predominant. Thus, H's services are incident to and for the purpose of pursuing a course of study. Accordingly, H's services are excepted from employment under section 3121(b)(10).

Example 8. (i) Employee J is a graduate teaching assistant at University Z. J is enrolled and regularly attending classes at Z in pursuit of a graduate degree. J has a course workload which constitutes a full-time course workload at Z. J's normal work schedule is 20 hours per week, but occasionally due to work demands unforeseen at the start of the academic term J works more than 40 hours during a week. J's duties include grading quizzes and exams pursuant to guidelines set forth by the professor, providing class and laboratory instruction pursuant to a lesson plan developed by the professor, and preparing laboratory equipment for demonstrations. J receives a cash stipend and employment benefits in the form of eligibility to make elective employee contributions to an arrangement described in section 403(b). In addition, J receives qualified tuition reduction benefits within the meaning of section 117(d)(5) with respect to the tuition charged for the credits earned for being a graduate teaching assistant.

(ii) In this example, J is employed by Z, a school, college, or university within the meaning of paragraph (c) of this section, and is enrolled and regularly attending classes at Z in pursuit of a course of study. J's full-time course workload relative to J's normal work schedule of 20 hours per week indicates that the educational aspect of J's relationship with Z is predominant. In addition, J is not a professional

employee because J's work does not require the consistent exercise of discretion and judgment in its performance. On the other hand, the fact that J receives employment benefits in the form of eligibility to make elective employee contributions to an arrangement described in section 403(b) indicates that the employment aspect of J's relationship with Z is predominant. Balancing the relevant facts and circumstances, the educational aspect of J's relationship with Z is predominant. Thus, J's services are incident to and for the purpose of pursuing a course of study. Accordingly, J services are excepted from employment under section 3121(b)(10).

(f) Effective date. Paragraphs (a), (b), (c), (d) and (e) of this section apply to services performed on or after April 1, 2005.

(g) For provisions relating to domestic service performed by a student in a local college club, or local chapter of a college fraternity or sorority, see § 31.3121(b)(2)-1.

RESPONDENT'S BRIEF

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In the Supreme Court of the United States

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Pursuant to 26 U.S.C. 3121(b)(10), "service performed in the employ of * * * a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university" is exempt from tax under the Federal Insurance Contributions Act, 26 U.S.C. 3101 *et seq.* The question presented is as follows:

Whether a Treasury regulation providing that full-time employees are not "students" for purposes of that exemption, 26 C.F.R. 31.3121(b)(10) 2(d)(3)(iii), is valid.

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Atlantic Mut. Ins. Co. v. *Commissioner*, 523 U.S. 382 (1998) 51

Bingler v. *Johnson*, 394 U.S. 741 (1969) 24

Board of Curators v. *Horowitz*, 435 U.S. 78 (1978) 48

Boston Med. Ctr. Corp., 330 N.L.R.B. 152 (1999) 49

Brown Univ., 342 N.L.R.B. 483 (2004) 49

Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 12, 14, 20, 50, 52, 53

Cottage Savings Assn. v. *Commissioner*, 499 U.S. 554 (1991) 51

Field v. *Commissioner*, 680 F.2d 510 (7th Cir. 1982) 46

Helvering v. *Davis*, 301 U.S. 619 (1937) 27

Johnson City Med. Ctr. v. *United States*, 999 F.2d 973 (6th Cir. 1993) 27

Lopez v. *Davis*, 531 U.S. 230 (2001) 34

Minnesota v. *Apfel*, 151 F.3d 742 (8th Cir. 1998) ... 7, 8, 30

National Cable & Telecomm. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 52, 53

National Muffler Dealers Ass'n v. *United States*, 440 U.S. 472 (1979) 18, 50, 51, 52

Cases—Continued: Page

Physicians Nat'l Housestaff Ass'n,
7 F.L.R.A. 434 (1981) 49
Regents of the Univ. of Cal. v. *Public Employment Relations Bd.*, 715 P. 2d 590 (Cal. 1986) 49
Regents of the Univ. of Mich. v. *Ewing*, 474 U.S. 214 (1985) 48
Rowan Cos. v. *United States*, 452 U.S. 247 (1981) 30
Smiley v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996) 52, 53
Social Sec. Bd. v. *Nierotko*, 327 U.S. 358 (1946) 24
St. Luke's Hosp. Ass'n v. *United States*, 333 F.2d 157 (6th Cir. 1964), cert. denied, 379 U.S. 963 (1965) 40
Swallows Holding, Ltd. v. *Commissioner*, 515 F.3d 162 (3d Cir. 2008) 51
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 44
United States v. *Boyle*, 469 U.S. 241(1985) 34, 51
United States v. *Centennial Sav. Bank FSB*, 499 U.S. 573 (1991) 24
United States v. *Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) 30, 51
United States v. *Detroit Med. Ctr.*, 557 F.3d 412 (6th Cir. 2009) 50
United States v. *Lee*, 455 U.S. 252 (1982) 24, 27, 34
United States v. *Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997 (D. Minn. 2003) 3, 6, 8
United States v. *Mead Corp.*, 533 U.S. 218 (2001) 50
United States v. *Memorial Sloan-Kettering Cancer Ctr.*, 563 F.3d 19 (2d Cir. 2009) 41, 50

Cases—Continued: Page:

United States v. *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248 (11th Cir. 2007) 40, 50
United States v. *Silk*, 331 U.S. 704 (1947) 24
United States v. *Wells Fargo Bank*, 485 U.S. 351 (1988) 24
United States Trust Co. v. *Helvering*, 307 U.S. 57 (1939) 24
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University of Chi. Hosps. v. *United States*, 545 F.3d 564 (7th Cir. 2008) 50

Statutes and regulations:

Federal Insurance Contributions Act, 26 U.S.C. 3101 *et seq.* 2
26 U.S.C. 3101 ..... 2, 20, 28, 1a
26 U.S.C. 3102 2
26 U.S.C. 3111 ..... 2, 28, 1a
26 U.S.C. 3121(a) 20
26 U.S.C. 3121(b) 2, 20
26 U.S.C. 3121(b)(6)(B) 42, 48, 49
26 U.S.C. 3121(7)(C)(ii) 42, 48, 49
26 U.S.C. 3121(b)(8)(B) (1964) 42
26 U.S.C. 3121(b)(10) ..... *passim*
26 U.S.C. 3121(b)(13) 26
Internal Revenue Code (26 U.S.C.):
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26 U.S.C. 7805(a) 51

Statutes and regulations—Continued: Page

Internal Revenue Code of 1954, ch. 736, § 3121(b)(11)(B), 68A Stat. 422 31
National Labor Relations Act, 29 U.S.C. 152(3) 49
Old-Age, Survivors, and Disability Amendments of 1965, Pub. L. No. 89-97, Tit. III, 79 Stat. 361:
§ 311(b)(1), 79 Stat. 381 42
§ 311(b)(4), 79 Stat. 381 42
§ 311(b)(5), 79 Stat. 381 39
§ 317(b)(3), 79 Stat. 389 42
Social Security Act, 42 U.S.C. 301 *et seq.* 6
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42 U.S.C. 410(a)(6)(D)(ii) 49
42 U.S.C. 410(a)(10) 7
42 U.S.C. 418 7
Social Security Act Amendments of 1939, ch. 66, § 606, 53 Stat. 1385 24
26 U.S.C. 1426(b)(10)(A) (1940) 6, 26
26 U.S.C. 1426(b)(10)(E) (1940) 6, 26
26 U.S.C. 1426(b)(13) (1940) 39
Social Security Act Amendments of 1950, ch. 809, § 204(b)(11)(B), 64 Stat. 531 (26 U.S.C. 1426(b)(11)(B)(1952)) 26
Social Security Amendments of 1954, ch. 1206, § 205(b), 68 Stat. 1091 31
Social Security Amendments of 1972, Pub. L. No. 92-603, § 129(a)(1), 86 Stat. 1359 31
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15 U.S.C. 37b(b)(1)(D) 48
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20 C.F.R. 404.1028 7
26 C.F.R.:
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Section 31.3121(b)(10)-2(e) 10, 37
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111 Cong. Rec. 16,106-16,107 (1965) 41
5 Fed. Reg. 787 (1940) 40
16 Fed. Reg. (1951):
p. 12,474 ..... 6, 30
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25 Fed. Reg. 13,051 (1960) 40
45 Fed. Reg. (1980):
20,074 7
20,082-20,083 7

Miscellaneous—Continued: Page

69 Fed. Reg. (2005):
p. 8604 ..... 32, 51
pp. 8604-8605 53
p. 8605 ..... 9, 25, 27, 32
p. 8606 9
pp. 8606-8607 ..... 25, 30
pp. 8606-8608 53
p. 8607 ..... 9, 27, 36
p. 8608 42
Federation of State Med. Bds., *State-specific Requirements for Initial Medical Licensure* (July 2010), http://www.fsmb.org/usmle_eliinitial.html 29
H.R. Rep. No. 728, 76th Cong. 1st Sess. (1939) 6, 24, 25, 40
H.R. Rep. No. 1300, 81st Cong., 1st Sess. (1949) 26
H.R. Rep. No. 213, 89th Cong., 1st Sess. (1965) 41, 42, 47
I.R.S. Chief Couns. Advice 200029030 (July 21, 2000) 32, 39, 54
I.R.S. Chief Couns. Advice 200212029 (Mar. 22, 2002) 32, 45, 55
I.R.S. Gen. Couns. Mem. 37,252 (Sept. 14, 1977) 6, 31
I.R.S. News Release IR-2010-25 (Mar. 2, 2010), http://www.irs.gov/pub/irs-tege/nr-2010_25.pdf 55
I.R.S. Tech. Adv. Mem. 9332005 (Aug. 13, 1993) 6, 31

Miscellaneous—Continued: Page

Medicare Payment Advisory Comm'n, *Rethinking Medicare's Payment Policies for Graduate Medical Education and Teaching Hospitals* (Aug. 1999), http://www.aamc.org/advocacy/teachhosp/medpac/rethinkingmedicare.pdf 46, 47

Teryl K. Nuckols et al., *Cost Implications of Reduced Work Hours and Workloads for Resident Physicians*, New Eng. J. of Med., May 21, 2009 ..... 46, 47

Rev. Proc. 98-16, 1998-1 C.B. 403 55

Rev. Rul. 66-285, 1966-2 C.B. 455 ..... 6, 31

Rev. Rul. 69-519, 1969-2 C.B. 185 29

Rev. Rul. 78-17, 1978-1C.B. 306 ..... 6, 31

Rev. Rul. 85-74, 1985-1 C.B. 331 27

S. Rep. No. 734, 76th Cong. 1st Sess. (1939) 6, 25, 40

S. Rep. No. 1669, 81st Cong., 2d Sess. (1950) 26

S. Rep. No. 404, 89th Cong., 1st Sess. Pt. 1 (1965) 41, 42, 47

Soc. Sec. Acq. Rul. 98-5(8), 63 Fed. Reg. 58,446 (1998) ... 30

Soc. Sec. Rul. 78-3, [1978-1979 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 15,641, at 2100, 1978 WL 14050 ..... 7, 8, 29, 54

T.D. 6190, 1956-2 C.B. 605 ..... 30, 40

T.D. 6983, 1969-1 C.B. 228 40

T.D. 7373, 1975-2 C.B. 394 30

T.D. 9167, 2005-1 C.B. 261 ..... 3, 9, 30, 32, 54

The Oxford Universal Dictionary on Historical Principles (3d ed. 1955) 22, 35

The Random House Dictionary of the English Language (2d ed. 1987) 22, 35

Miscellaneous—Continued. Page

U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, *Bulletin 2800, Occupational Outlook Handbook* (2010-2011 Library Ed.) 28, 29

U.S. Census Bureau, U.S. Dep't of Commerce, *Median Household Income for States: 2007 and 2008 American Community Surveys* (Sept. 2009), http://www.census.gov/prod/2009pubs/acsbr08-2.pdf 45

Webster's Third New International Dictionary of the English Language (1981) 11

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet App. 1a-19a) is reported at 568 F.3d 675. The opinion of the district court in *Mayo Foundation for Medical Education & Research* v. *United States* (Pet. App. 20a-46a) is reported at 503 F. Supp. 2d 1164. The opinion of the district court in *Regents of the University of Minnesota* v. *United States* (Pet. App. 47a-65a) is unreported but is available at 2008 WL 906799.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2009. A petition for rehearing was denied on September 17, 2009 (Pet. App. 66a-67a). On December 7, 2009, Justice Alito extended the time within which to

file a petition for a writ of certiorari to and including January 15, 2010. The petition was filed on January 14, 2010, and was granted on June 1, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are set forth in an appendix to this brief. App., *infra*, 1a-19a.

STATEMENT

This case concerns the validity of Treasury Department regulations governing the "student" exemption from coverage under the Federal Insurance Contributions Act (FICA), 26 U.S.C. 3101 *et seq.* To fund the Social Security and Medicare programs, FICA requires employers and employees to pay taxes on "wages" from "employment," broadly defined as "any service, of whatever nature, performed * * * by an employee." 26 U.S.C. 3101, 3102, 3111, 3121(b). FICA contains certain limited exceptions to that broad definition of "employment," including an exception for service performed in the employ of a "school, college, or university" if "such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. 3121(b)(10).

Treasury regulations have long interpreted that exemption as limited to individuals who are predominantly students and only secondarily or incidentally employees. Beginning in the late 1990s, however, litigation over the eligibility of medical residents for the exemption revealed confusion over how that limitation applies to full-time employees whose employment involves on-the-job training or otherwise has an educational component. In response, the Treasury Department amended its regula-

tions to provide that full-time employees do not qualify for the student exemption, even if their employment has an educational component. T.D. 9167, 2005-1 C.B. 261 (promulgating 26 C.F.R. 31.3121(b)(10)-2(d)(3)(i) and (iii)). The court of appeals upheld the validity of that "full-time employee" rule. Pet. App. 1a-19a.

1. Petitioners, the Mayo Foundation for Medical Education and Research and the Mayo Clinic (collectively Mayo) and the Regents of the University of Minnesota (the University), sponsor programs for medical residents and fellows (collectively residents). Residents are physicians who have graduated from medical school and received M.D. degrees but are pursuing further training in a specialty or subspecialty. Pet. App. 2a, 22a n.2. A residency program generally lasts three to seven years. *United States v. Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 1002 (D. Minn. 2003) (*Mayo I*). After completing the program, a resident does not receive a degree, but rather obtains a certificate of completion and becomes eligible to take an examination for certification in a specialty or subspecialty. *Id.* at 1004-1005.

Residents are assigned to rotations during which they perform medical duties in various practice areas at Mayo's medical facilities and at hospitals and clinics affiliated with the University. Pet. App. 62a-63a; *Mayo I*, 282 F. Supp. 2d at 1003-1004. On their rotations, residents work between 50 and 80 hours per week treating patients. J.A. 76a, 114a-116a, 153a. Residents generally report to work early in the morning and leave in the evening, as dictated by patient needs. A workweek of between 75 and 80 hours is not uncommon. J.A. 30a, 72a, 97a-98a, 125a.

Under guidelines established in 2003 by the Accreditation Council for Graduate Medical Education (ACGME), residents may work no more than 80 hours per week and no more than 30 consecutive hours at any time. J.A. 106a-107a, 113a. After ACGME instituted the 80-hour limit, hospitals were forced to hire additional staff to provide patient care that residents could no longer provide. J.A. 113a-114a.

Residents are supervised by staff physicians, who hold faculty appointments at petitioners' medical schools. J.A. 45a, 61a. Residents are also supervised by more senior residents. J.A. 39a-40a, 53a, 123a, 178a-186a. Unlike medical students, residents present themselves to patients as doctors. J.A. 48a-49a, 68a, 110a-111a, 203a-204a. Residents initially treat patients under fairly close supervision by attending physicians and more senior residents. As they gain experience, however, residents assume extensive responsibilities and perform complicated procedures with minimal oversight. J.A. 99a-101a, 111a-112a, 134a-138a, 174a-186a. In some disciplines, attending physicians may spend only two to three hours per day at the hospital. J.A. 69a. At night, residents must take action, including potentially lifesaving steps, without significant opportunity to consult attending physicians. J.A. 36a, 67a-68a, 131a-132a.

Residents are responsible for a designated number of patients over the course of a shift. Residents' duties include obtaining medical histories, performing physical examinations, diagnosing medical problems, and serving on emergency call. J.A. 34a-37a, 38a-43a, 89a, 174a-186a, 191a-198a. Residents recommend plans of care, order laboratory tests, prescribe medications, and write progress notes on their patients without first consulting attending physicians. J.A. 34a-35a, 68a-69a, 87a-94a,

122a-123a, 132a, 194a-197a. Even relatively inexperienced residents perform physical examinations and procedures such as inserting intravenous devices, injecting local anesthesia, stitching wounds, performing CPR, using defibrillators, and executing lumbar punctures with no attending physician present, as long as one is on call. J.A. 40a-43a, 134a-135a. Residents continue to perform procedures after mastering them; indeed, a resident's refusal to perform a procedure that he has already learned "would result in major disciplinary action." J.A. 54a.

Residents are "essential to patient care." J.A. 58a. They serve on "code" teams and perform emergency procedures, such as intubating newborn infants in crisis. J.A. 42a-43a, 66a-68a, 94a-95a, 129a-130a, 137a-139a. A resident's diagnosis of a condition overlooked by an attending physician can save a life. J.A. 139a-142a.

In addition to their patient-care duties, residents attend weekly lectures, called grand rounds, and conferences for a few hours per week. Pet. App. 41a n.10, 63a. These formal educational activities, however, take up only 10%-15% of a resident's time. J.A. 50a, 72a, 82a, 114a-115a. Although residents are sometimes required to attend conferences, attendance can be excused because of patient-care responsibilities, which take precedence. Pet. App. 41a n.10; J.A. 107a, 119a, 128a.

Residents are compensated by "stipends" that increase with experience. During the second quarter of 2005, stipends ranged between $41,057 and $55,935 annually for Mayo's residents and between $43,647 and $55,679 for the University's residents. J.A. 22a, 172a. Petitioners also provide residents health insurance, malpractice insurance, and paid vacation time. The University provides its residents life and long-term disability

insurance, and Mayo gives its residents the opportunity to purchase that coverage. J.A. 199a-200a; *Mayo I*, 282 F. Supp. 2d at 1005 n.22.

2. FICA has included a "student" exemption since the enactment of the Social Security Act Amendments of 1939 (1939 Act), ch. 666, § 606, 53 Stat. 1384-1385 (26 U.S.C. 1426(b)(10)(A) and (E) (1940)). The legislative history accompanying the 1939 Act expressed the intent that the exemption would apply only where "the employment is part-time or intermittent and the total amount of earnings is only nominal." H.R. Rep. No. 728, 76th Cong., 1st Sess. 18 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 19 (1939). The Treasury has consistently interpreted the exemption as limited to individuals who are primarily students and only secondarily or incidentally employees. In 1951, the Treasury adopted a regulation stating that the exemption is limited to individuals whose employment services are "incident to and for the purpose of pursuing a course of study." 16 Fed. Reg. 12,474 (promulgating 26 C.F.R. 408.219 (Cum. Supp. 1952)). The requirement that services be "incident to" a qualifying individual's predominant activities as a student has remained in the regulations ever since. See, *e.g.*, 26 C.F.R. 31.3121(b)(10)-2(d); 26 C.F.R. 31.3121(b)(10)-2(e) (2004). In applying the predominance requirement, the Treasury has repeatedly indicated that the number of hours worked is an important factor and that full-time work is generally inconsistent with eligibility for the student exemption. See, *e.g.*, Rev. Rul. 78-17, 1978-1 C.B. 306; Rev. Rul. 66-285, 1966-2 C.B. 455; I.R.S. Gen. Couns. Mem. 37,252 (Sept. 14, 1977); I.R.S. Tech. Adv. Mem. 9332005 (Aug. 13, 1993).

The provisions of the Social Security Act, 42 U.S.C. 301 *et seq.*, describing what employment is covered for

benefits eligibility contain a student exception substantially identical to the tax exemption under FICA. 42 U.S.C. 410(a)(10). Like the Treasury's regulations, the regulations promulgated by the Social Security Administration (SSA) to implement that exception have, since 1951, interpreted it as limited to individuals who are predominantly students and whose employment is only incidental. See 16 Fed. Reg. at 13,070 (promulgating 20 C.F.R. 404.1019 (Cum. Supp. 1952) (limitation identical to limitation in Treasury regulations); 45 Fed. Reg. 20,074, 20,082-20,083 (1980) (revising language of limitation, now codified at 20 C.F.R. 404.1028, for stylistic purposes). In 1978, the SSA issued an interpretive ruling expressing its longstanding view that medical residents do not fall within the Social Security Act's student exception. Soc. Sec. Rul. 78-3, [1978-1979 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 15,641, at 2100, 1978 WL 14050 (SSR 78-3).

Apart from the isolated inquiry that prompted that 1978 SSA ruling, no one appears to have contended that residents are "students" eligible for the FICA and Social Security exceptions until the litigation that culminated in *Minnesota* v. *Apfel*, 151 F.3d 742 (8th Cir. 1998). *Apfel* involved the coverage under the Social Security Act of the University's residents during 1985 and 1986. Because the University is a state institution, those residents were not subject to FICA tax and were covered under the Social Security Act only if the State had elected to cover them by entering into an agreement under 42 U.S.C. 418. In *Apfel*, Minnesota and the SSA disputed whether the University's residents were "employees" covered under the terms of Minnesota's Section 418 agreement. The court of appeals held that the residents were not "employees" under the agreement.

151 F.3d at 745-747. Alternatively, the court concluded that the residents were excluded from the agreement because they qualified for the student exception to the Social Security Act. *Id.* at 747-748. In reaching that conclusion, the court rejected "[t]he bright-line rule" advanced by the SSA in SSR 78-3 as "inconsistent" with the SSA's regulation, which the court viewed as calling for a "case-by-case" determination of student status. *Id.* at 748.

The decision in *Apfel* triggered an "avalanche" of litigation. Pet. App. 3a. Sponsors of residency programs filed more than 7000 claims seeking refunds of FICA taxes they had paid on residents' wages, asserting that the residents were covered by FICA's student exemption. *Id.* at 4a. One refund action was brought by petitioner Mayo. *Mayo I*, *supra*. In ruling for petitioner, the district court rejected the Treasury's contention that residents are categorically ineligible for the FICA student exemption. The court held that, under the Eighth Circuit's decision in *Apfel*, the Treasury regulations implementing the FICA exemption, like the SSA's regulations implementing the Social Security Act exception, should be construed to require a case-by-case examination of student status. *Mayo I*, 282 F. Supp. 2d at 1005-1007. Based on that case-specific examination, the court concluded that Mayo's residents qualified for FICA's student exemption. *Id.* at 1015-1018.

3. The litigation generated by the *Apfel* decision prompted the Treasury to reassess its regulations governing the student exemption. In 2004, the Treasury issued a notice of proposed rulemaking, which explained that the litigation had revealed the need for "additional clarification" regarding "whether certain employees performing services in the nature of on the job training

have the status of a student who is enrolled and regularly attending classes for purposes of section 3121(b)(10)." 69 Fed. Reg. 8605. The Treasury noted that, under the "incident to" provision of its existing regulations, "to qualify for the exception, the individual's predominant relationship with the [school, college, or university] must be as a student, and only secondarily or incidentally as an employee." *Id.* at 8607. The Treasury proposed regulations that would clarify that a full-time employee (*i.e.*, an individual whose normal work schedule is 40 or more hours per week) does not meet the predominant relationship requirement because full-time employees "have filled the conventional measure of available time with work, and not study," and "are earning wages at a level that exceeds Congress's intended scope for the student FICA exception." *Ibid.*; see *id.* at 8606 (citing the 1939 Act legislative history). The Treasury observed that "[r]esolution of this issue has significant social security benefits and FICA tax implications," noting the SSA's concern that exempting residents could deprive them of needed disability and survivorship benefits. *Id.* at 8605.

After receiving comments and holding a public hearing, the Treasury amended its regulations. T.D. 9167, *supra*. The amended regulations, which are effective for services performed on or after April 1, 2005, 26 C.F.R. 31.3121(b)(10)-2(f), retain the general approach of the prior regulations, under which status as a "student * * * enrolled and regularly attending classes," 26 U.S.C. 3121(b)(10), is limited to those who perform services "incident to and for the purpose of pursuing a course of study," 26 C.F.R. 31.3121(b)(10)-2(d)(3)(i). The amended regulations state explicitly that this standard is satisfied only if "[t]he educational aspect of the

relationship between the employer and the employee, as compared to the service aspect," is "predominant." *Ibid.* The regulations also clarify that "[t]he evaluation of the service aspect of the relationship is not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect." *Ibid.*

The amended regulations further provide that, although the determination whether an employee satisfies the predominance requirement is generally based upon all the relevant facts and circumstances, 26 C.F.R. 31.3121(b)(10)-2(d)(3)(i), that case-by-case analysis does not apply to "a full-time employee," *i.e.*, an employee whose normal work schedule is 40 hours or more per week, 26 C.F.R. 31.3121(b)(10)-2(d)(3)(iii). Instead, the regulations establish a categorical rule that "[t]he services of a full-time employee are not incident to and for the purpose of pursuing a course of study." *Ibid.* The regulations include examples to illustrate their application, including the example of a medical resident who is normally scheduled to work at least 40 hours per week. The accompanying discussion explains that, as a full-time employee, the resident is ineligible for the student exemption, even though some of the services he performs have an educational or training aspect. 26 C.F.R. 31.3121(b)(10)-2(e), Example 4.[1]

4. After the amended regulations took effect, petitioners brought suits in the District Court for the Dis-

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[1] The amended regulations also clarify that an employer is not a "school, college, or university" unless its "primary function" is the presentation of formal instruction. 26 C.F.R. 31.3121(b)(10)-2(e). Although Mayo challenged that provision in the district court, the court of appeals found it unnecessary to address the provision's validity. Pet. App. 19a. Accordingly, that issue is not before this Court.

trict of Minnesota, challenging the validity of the regulations and seeking refunds of FICA taxes they had paid for their residents during the second quarter of 2005. The district court struck down the "full-time employee" rule in Mayo's suit (Pet. App. 38a-43a), and then followed that ruling in the University's case (*id.* at 54a).

In its opinion in Mayo's case, the district court concluded that the full-time employee rule is not "a permissible and reasonable interpretation" of Section 3121(b)(10) because the rule is inconsistent with the unambiguous meaning of the word "student." Pet. App. 38a. The court stated that "[t]he word 'student' is well defined and commonly understood outside the context of the Student Exclusion," noting that the dictionary definition is "an individual who engages in 'study' and is 'enrolled in a class or course in a school, college, or university.'" *Id.* at 39a (quoting *Webster's Third New International Dictionary of the English Language* 2268 (1981)). The court reasoned that "[a] natural reading of the full text in which the term 'student' appears demonstrates that an employee is a 'student' so long as the educational aspect of his service predominates over the service aspect of the relationship with his employer." *Ibid.*

The district court determined that "[t]he full-time employee exception arbitrarily narrows this definition by providing that a 'full-time' employee is not a 'student' even if the educational aspect of an employee's service predominates over the service aspect." Pet. App. 40a. The court found that the Treasury's regulatory approach was impermissible because it "ignores the educational aspect of student services" and "denies 'student' status to medical residents even though the services they provide are primarily for educational purposes and

essential to becoming fully qualified physicians." *Ibid.* Because the court had already determined in *Mayo I* that Mayo's residents qualified as students under the prior regulations, it ruled that Mayo was entitled to a refund of $1,676,118 in FICA taxes. *Id.* at 41a, 46a.

In the University's case, the district court noted that it had already ruled, in Mayo's case, that the full-time employee rule is invalid. Pet. App. 54a. It then held, on a summary judgment record, that the University's residents qualified for the student exemption under the prior regulations. *Id.* at 55a-65a. Accordingly, the court awarded the University a refund of $1,094,803. *Id.* at 65a.

5. The court of appeals reversed the district court's judgments. Pet. App. 1a-19a. The court observed that a Treasury regulation is valid and entitled to deference if the statutory provision that it interprets is "ambiguous with respect to the specific issue" and the regulation "is based on a permissible construction of the statute." *Id.* at 8a (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984)). The court noted that "four of [its] sister circuits have recently declared, in cases arising under the former regulations, that the student exception is unambiguous and 'does not limit the types of services that qualify for the exemption.'" *Id.* at 9a (citation omitted). The court observed, however, that "[v]iewed narrowly," those decisions "held only that the statute *as construed in the prior regulations* precluded the government's contention that payments to medical residents are *categorically* ineligible for the student exception." *Id.* at 9a n.2. The court stressed that the decisions "did not address the validity of the amended regulations," explaining that petitioners' challenge to those regulations "raises an entirely different issue." *Ibid.*

To the extent that the other circuits had suggested that any Treasury regulation clarifying the meaning of the term "student" in Section 3121(b)(10) is necessarily invalid because that term has an established common meaning, the court of appeals rejected that approach. Pet. App. 9a-11a. The court observed that this Court has frequently upheld Treasury regulations interpreting terms that have a plain or common meaning in other contexts on the ground that their meaning as used in tax statutes is not clear. *Id.* at 10a-11a. The court of appeals noted that Section 3121(b)(10) further requires that the student be "enrolled and regularly attending classes." *Id.* at 11a. In the court's view, Section 3121(b)(10) is susceptible to an interpretation that "limits the student exception to services that are subordinate to the student's educational activities." *Ibid.* Stressing that "words must be construed in context," the court held that "the statute is silent or ambiguous on the question whether a medical resident working for the school full-time is a 'student who is enrolled and regularly attending classes' for purposes of [Section] 3121(b)(10)." *Id.* at 12a.

The court of appeals next held that the amended regulation "is a permissible interpretation of the statute." Pet. App. 12a. Examining the history of the FICA exemptions, the court concluded that they "were directed to part-time workers" and that "the full-time employee limitation in the amended regulation is [therefore] consistent with the origin and purpose of the student exception." *Id.* at 15a. The court also noted that Treasury regulations have included the "incident to" requirement for more than 50 years, that petitioners had not challenged its validity, and that the Treasury has consistently interpreted that requirement as not encompass-

ing full-time employees. *Id.* at 15a, 17a, 18a. The court further observed that, although the courts in *Apfel* and *Mayo I* had applied the prior "regulation in a contrary manner, * * * the Commissioner responded with amended regulations more specifically articulating the underlying policy." *Id.* at 17a. Relying on this Court's repeated holdings that "agencies may validly amend regulations to respond to adverse judicial decisions, * * * so long as the amended regulation is a permissible interpretation of the statute" (*id.* at 17a-18a), the court of appeals concluded that the "full-time employee" rule is valid (*id.* at 19a).

SUMMARY OF ARGUMENT

The Treasury Department's regulations reasonably construe the student exemption from FICA tax in 26 U.S.C. 3121(b)(10) as not encompassing full-time employees, even if their remunerative work has a training or educational component. The court of appeals correctly upheld that full-time employee rule under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

A. Under Section 3121(b)(10), service performed in the employ of a "school, college, or university" is excluded from FICA's definition of "employment" if "such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. 3121(b)(10). Section 3121(b)(10)'s reference to "service performed by a student" indicates that an individual's status as a student does not depend on the activity he is performing at a given moment, but is instead determined as a general matter, based on the individual's predominant activities during a larger period of time. And the requirement that the student "regularly" attend classes implies a limit on the amount

of time that a qualifying individual may spend on other, non-student activities, including work.

The text of Section 3121(b)(10) also suggests that an individual may not qualify as a "student" based on the educational or training value of his employment. Although the term "student" can sometimes broadly refer to anyone engaged in any manner of study or learning, it is more commonly used to refer to someone engaged in formal, academic instruction. The surrounding text—which requires that the student be "enrolled and regularly attending classes at [a] school, college, or university"—suggests that Section 3121(b)(10) uses "student" in that narrower sense, which does not naturally encompass a full-time employee serving an apprenticeship or receiving on-the-job-training. That interpretation of "student" is also more consistent with ordinary usage. One would not customarily use the term "student" to describe a judge's law clerk or an architect who interns at a firm as a prerequisite to independent licensure, even though those employees certainly learn from their work.

Construing the student exemption narrowly so as not to encompass full-time employees is also consistent with this Court's repeated recognition that coverage under FICA and the Social Security Act should be construed expansively and exemptions from taxation should be construed narrowly. The legislative history also supports the rule. The relevant committee reports make clear that Congress viewed the student exemption as an administrative convenience that would not meaningfully affect tax receipts or Social Security benefits, and the reports state that the exemption applies only to individuals engaged in part-time or intermittent work. Excluding full-time employees from the student exemption also

advances FICA's purposes by ensuring that full-time employees pay FICA taxes on their compensation and earn credit toward benefits throughout their working lives. It thereby promotes the fiscal soundness of the Social Security and Medicare programs, while reducing the risk that affected workers and their families will be left without needed benefits in the event of death or disability.

Based on many of these same considerations, the Treasury has long interpreted the student exemption as limited to individuals who are predominantly students and only incidentally employees. Although the Treasury historically relied on a case-specific examination of all the facts and circumstances to determine whether the predominance limitation was satisfied, it consistently stressed that the number of hours worked was an important consideration and that full-time work is generally inconsistent with student status. Litigation spawned by the *Apfel* decision, however, revealed confusion about how the predominance requirement applies to full-time employees whose work has a training or educational component. That litigation also revealed the administrative difficulties in using a case-by-case approach to determine student status in all circumstances. The Treasury responded by amending its regulations to adopt the full-time employee rule. That rule reasonably addresses a recurring factual situation in a manner consistent with the statute's language, context, purpose, and history, and with the Treasury's longstanding interpretation of the student exemption. The court of appeals therefore correctly deferred to the rule under *Chevron*.

B. Petitioners contend that the full-time employee rule is inconsistent with the "plain meaning" of the word "student," which petitioners construe as encompassing

all persons engaged in any manner of study or learning. But although the word "student" *can* be used in the expansive manner that petitioners advocate, the word is more often used in a narrower sense that excludes full-time employees who are learning on the job. Petitioners' broad construction, moreover, would lead to results that Congress could not have intended. Any employee of a school, college, or university—from the president to a member of the admissions staff—could exempt himself from FICA tax by enrolling in evening classes. And individuals who ought to be treated equivalently for FICA coverage would be treated inconsistently. Architects, engineers, and surveyors serving internships at professional firms as a prerequisite for licensure would not qualify for the student exemption because they do not work for schools, colleges, or universities. Even some medical residents would not qualify for the exemption if their hospitals were not considered schools, colleges, or universities. But residents employed by schools, colleges, and universities would qualify.

C. Petitioners' contention that their medical residents unambiguously qualify for the student exemption is also inconsistent with FICA's historical development, which strongly suggests that the exemption does not encompass medical residents. When Congress enacted the student exemption, it also enacted an exemption for medical interns, and it made a considered decision not to include residents in that exemption. Both the enactment of the intern exemption and the decision to exclude residents from its coverage would have been pointless if the student exemption already excluded residents (and thus interns) from FICA coverage. Moreover, in 1965, Congress repealed the intern exemption, along with several other exemptions that applied to doctors, in an effort to

ensure that Social Security coverage would extend to doctors at all stages of their careers after medical school. That legislation would not have achieved Congress's goals if residents were excluded from coverage under the student exemption.

In addition to ignoring these statutory developments, petitioners' arguments that their residents are unambiguously "students" are flawed on their own terms. Most notably, petitioners ignore the fact that residents spend the vast majority of their time—50 to 80 hours a week—treating patients in exchange for a substantial salary and employee benefits. Petitioners also ignore the facts that residents frequently perform complex and sometimes life-saving medical procedures with minimal supervision and that for many hours of each day they are the only physicians directly treating patients.

D. Petitioners are wrong in contending that the full-time employee rule is invalid because it fails to satisfy a multi-factor test set out in *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472 (1979). *National Muffler* has been superseded by *Chevron*, and most of the *National Muffler* factors on which petitioners rely are not relevant under *Chevron*. Moreover, although petitioners characterize the full-time employee rule as novel, the rule is simply a refinement of the Treasury's longstanding view that the student exemption encompasses only those who are predominantly students, and the rule is consistent with the historical understanding of both taxpayers and the government that residents do not qualify for the student exemption.

ARGUMENT

THE TREASURY REGULATIONS REASONABLY INTERPRET FICA'S STUDENT EXEMPTION AS NOT ENCOMPASSING FULL-TIME EMPLOYEES

Since FICA's student exemption was enacted, the Treasury has interpreted it as limited to individuals who are predominantly students and only incidentally employees. In response to uncertainty about how that predominance requirement applies to full-time employees (such as medical residents) whose employment has a training or educational aspect, the Treasury amended its regulations to make clear that the exemption does not cover such workers.

The Treasury's conclusion that petitioners' residents fall outside the student exemption rests on three subsidiary determinations. First, consistent with the Treasury's longstanding view, the amended regulations state that, when an individual both pursues a course of study and performs remunerative work for his school, college, or university, the applicability of the student exemption turns on whether the course-of-study or the service component of the relationship between the individual and the school predominates. Second, the amended regulations clarify that, in conducting the predominance inquiry, the Treasury does not attach weight to the fact that particular remunerative work may itself have an educational or training element. Third, the amended regulations establish a bright-line rule that full-time employees categorically fall outside the student exemption.

As the court of appeals recognized, the Treasury's regulatory approach is valid and entitled to deference if the pertinent statutory provision is "ambiguous with

respect to the specific issue" and the regulation "is based on a permissible construction of the statute." Pet. App. 8a (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984)). Although 26 U.S.C. 3121(b)(10) does not directly address the proper treatment of full-time employees who learn through on-the-job training, the statute's text, context, history, and purpose all support the reasonableness of the Treasury's interpretation. Accordingly, the court of appeals correctly deferred to the full-time employee rule under *Chevron*.

A. The Full-Time Employee Rule Reflects A Reasonable Interpretation Of The Student Exemption

1. The statutory text supports the full-time employee rule

FICA requires all employers and employees to pay taxes on "wages" from "employment," 26 U.S.C. 3101, 3111, and it defines those terms in sweeping language. "Wages" include "all remuneration for employment," subject only to certain specified exceptions. 26 U.S.C. 3121(a). And "employment" includes "any service, of whatever nature, performed * * * by an employee for the person employing him," again subject only to limited exceptions. 26 U.S.C. 3121(b). Because employment includes "any service, of whatever nature," it plainly encompasses service that has an aspect of training or learning. Such service is therefore subject to FICA unless a specific exemption applies.

As relevant here, FICA's definition of "employment" excludes service performed in the employ of a "school, college, or university" if "such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. 3121(b)(10). Section 3121(b)(10) does not directly ad-

dress the question whether the exemption encompasses full-time employees whose work provides them with training or other educational benefits. Analyzed closely, however, the statutory text supports the conclusion that the exemption does not encompass full-time employees, even if their employment has an educational or training aspect.

First, the phrase "service performed by a student" supports the Treasury's longstanding view that the exemption is limited to individuals who are predominantly students and only incidentally employees. If an individual's status as a "student" varied from moment to moment depending on the activity in which he was engaged at a given time—*e.g.*, if an undergraduate ceased to be a "student" during the hours that he spent working in the campus cafeteria or shelving books in the school library—Section 3121(b)(10)'s reference to "service performed by a student" would be an oxymoron. Section 3121(b)(10)'s evident assumption that "service" can be "performed by a student" makes sense only if the determination of "student" status is based on an individual's overall mix of activities during a relatively extended period of time. Once that premise is accepted, it is reasonable to conclude that a person qualifies as a "student" only if his activities in that capacity predominate.

That conclusion is reinforced by the statute's requirement that a student be "regularly" attending classes. That requirement implies that a qualifying individual will spend only a limited amount of time on other, non-student activities, including work. A predominance requirement is also supported by common usage of the word "student." One would not ordinarily refer to a CPA working full-time in a university's budgeting office as a "student," even if the accountant is also taking

classes at the university after work hours. Nor would one ordinarily refer to a full-time attorney in a university's general counsel's office as a "student," even if he attends classes at the university's law school in order to fulfill his continuing legal education requirements.

Second, the text supports the full-time employee rule's underlying premise that an individual cannot qualify as a "student" based on the fact that his employment has educational or training value. That premise is reflected in the phrase "service performed by a student," which indicates that the "service" performed "by" a qualifying individual is separate from the attributes that render him a "student." The premise is also inherent in the term "student" as it is used in Section 3121(b)(10). The term "student" can sometimes be used very broadly to refer to anyone engaged in any manner of study or learning. *E.g.*, *The Random House Dictionary of the English Language* 1888 (2d ed. 1987) ("any person who studies, investigates, or examines thoughtfully") (*Random House Dictionary*). But the term also has the narrower meaning of someone engaged in formal, academic instruction. See *ibid.* ("a person formally engaged in learning, esp. one enrolled in a school or college"); *The Oxford Universal Dictionary on Historical Principles* 2049 (3d ed. 1955) (*OUD*) ("[a] person who is undergoing a course of study and instruction at a university or other place of higher education or technical training"). The surrounding text suggests that Section 3121(b)(10) uses "student" in that more limited sense because it requires that the student be "enrolled and regularly attending classes at [a] school, college, or university." 26 U.S.C. 3121(b)(10). And the more limited meaning of "student"

does not naturally encompass a full-time employee who is receiving on-the-job training.[2]

Interpreting the word "student" to exclude full-time workers whose jobs have a training or educational aspect is also more consistent with ordinary usage. One would not generally use the term "student" to describe a judge's law clerk, even though the clerk undoubtedly learns from his work experience. Nor would one customarily use the term to describe an architect interning at a firm before he can be independently licensed. And most people (including most patients) would not use the word "student" to describe resident physicians—who have M.D. degrees and are eligible to become licensed physicians after one year of residency, and who serve on the front lines of patient care in numerous hospitals and emergency rooms. They would call the residents what they are—doctors.

2. The statutory context supports the full-time employee rule

FICA taxes are used to fund the important old-age, survivors, disability, and health insurance programs established by the Social Security Act. The coverage provisions of FICA and the Social Security Act parallel each other, and the Social Security Act includes a student exception that mirrors FICA's tax exemption. Because of the breadth of the terms "wages" and "employ-

[2] The broader structure of the exemption supports this conclusion. A student is not ordinarily paid for pursuing a course of study, and that activity, which establishes an individual's status as a student, therefore is not a concern of FICA. FICA instead covers services performed for wages. The distinction indicates that time spent in performing such services is not also an aspect of the individual's underlying status as a student, even if his employment has some training or educational features.

ment" that define coverage under both statutes, the specificity of the exemptions from coverage, and the importance of broad coverage to the Social Security Act's goals, this Court has long held that the statutory provisions should be construed in favor of coverage unless an exemption is clear. See *United States* v. *Silk*, 331 U.S. 704, 711-712 (1947); *Social Sec. Bd.* v. *Nierotko*, 327 U.S. 358, 365 (1946); see also *United States* v. *Lee*, 455 U.S. 252, 261 (1982).

More generally, the Court has consistently held that tax exemptions may not "rest upon implication," *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60 (1939), but "must be unambiguously proved," *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 354 (1988). Accordingly, tax exemptions are "construed narrowly." *United States* v. *Centennial Sav. Bank FSB*, 499 U.S. 573, 583 (1991); see, *e.g.*, *Bingler* v. *Johnson*, 394 U.S. 741, 751-752 (1969). The longstanding principles that coverage under FICA and the Social Security Act should be construed expansively and that tax exemptions should be construed narrowly both support the construction of the student exemption embodied in the full-time employee rule.

3. The legislative history supports the full-time employee rule

The student exemption was originally enacted by the Social Security Act Amendments of 1939, ch. 66, § 606, 53 Stat. 1385 (1939 Act). The committee reports accompanying that legislation explain that the exemption was one of several designed "to eliminate the nuisance of inconsequential tax payments" without meaningfully affecting Social Security benefits. H.R. Rep. No. 728, 76th Cong. 1st Sess. 17 (1939) (*1939 House Report*);

S. Rep. No. 734, 76th Cong. 1st Sess. 19 (1939) (*1939 Senate Report*). The reports state that the exemptions were intended to apply only where "the employment is part-time or intermittent and the total amount of earnings is only nominal." *Ibid.*; *1939 House Report* 18.

As the Treasury recognized in the rulemaking that produced the full-time employee rule, the legislative history's description of the purpose and anticipated effect of the student exemption supports the conclusion that full-time employees do not qualify for the exemption even if their work provides them training or other educational benefit. 69 Fed. Reg. at 8606-8607. Petitioners' medical residents—who work between 50 and 80 hours a week and earn between $41,000 and $56,000 a year—well illustrate the point. Their employment is neither "part-time" nor "intermittent"; their earnings are not "nominal"; and the tax implications and benefit consequences of exempting such full-time workers would not be "inconsequential." The Treasury estimates that exempting medical residents alone would result in the loss of approximately $700 million a year in FICA tax revenues. And the SSA has stated that, given the long duration of many residencies, an exemption could "have a very significant effect" on the eligibility of residents and their families for disability and survivor benefits. *Id.* at 8605.

Contrary to petitioners' contention (Br. 37-39), the 1950 amendments to the student exemption do not undermine the full-time employee rule. As originally enacted in 1939, the student exemption was divided into two provisions, one that exempted services performed by students for tax-exempt organizations and another that exempted services performed by students at non-tax-exempt schools, if the quarterly remuneration did

not exceed $45. See 1939 Act § 606, 53 Stat. 1385 (26 U.S.C. 1426(b)(10)(A) and (E) (1940)). In 1950, when Congress consolidated the two provisions into one, it eliminated that fixed dollar cap on quarterly earnings. Social Security Act Amendments of 1950, ch. 809, § 204(b)(11)(B), 64 Stat. 531 (26 U.S.C. 1426(b)(11)(B) (1952)). The elimination of the $45 cap does not logically imply, however, that Congress intended to expand the scope of the exemption beyond "part-time or intermittent" work to full-time employees. Rather, Congress more likely eliminated the dollar cap because it concluded that the remaining language of the exemption already embodied a limitation to part-time work and that a fixed dollar cap was not a precise or sensible way to implement that limitation over the long term.[3]

The Treasury has also relied on the 1939 legislative history in interpreting a related FICA exemption, which was enacted at the same time as the student exemption and has never contained a fixed dollar cap. That other exemption excludes "service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law." 26 U.S.C. 3121(b)(13). The Treasury has long taken the view that

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[3] The committee reports accompanying the 1950 amendments describe the amended statute as "continu[ing]" the prior exemption. H.R. Rep. No. 1300, 81st Cong., 1st Sess. 12 (1949); S. Rep. No. 1669, 81st Cong., 2d Sess. 15 (1950). And the reports reiterate that the exemption is intended to "simplify administration without depriving a significant number of people of needed protection." *Ibid.*; H.R. Rep. No. 1300, at 12. Those statements refute petitioners' contention (Br. 38) that the 1950 amendments were intended to expand the student exemption to encompass full-time workers.

this student nurse exemption applies only when a nurse's "employment is substantially less than full-time." Rev. Rul. 85-74, 1985-1 C.B. 331, 332. That Revenue Ruling has been upheld as a reasonable interpretation of the student nurse exemption. *Johnson City Med. Ctr.* v. *United States*, 999 F.2d 973, 977 (6th Cir. 1993). The full-time employee rule is likewise a reasonable interpretation of the similarly-worded general student exemption.

4. The full-time employee rule advances FICA's purposes

a. FICA's goal is to collect contributions from employees throughout their working lives in order to fund benefits when workers retire or if they die or become disabled before retirement. See *Lee*, 455 U.S. 258-259 & n.7. Broad and continuous coverage of employees under FICA is essential to the fiscal vitality of the Social Security and Medicare programs, *id.* at 258-259, 261, and it enables the covered employees to qualify for important benefits, *Helvering* v. *Davis*, 301 U.S. 619, 641-644 (1937). The full-time employee rule advances FICA's purposes by ensuring that employees working full-time pay FICA taxes on their compensation and earn credit toward benefits throughout their working lives. The rule thereby promotes the fiscal soundness of the Social Security and Medicare programs while reducing the risk that affected workers who die or become disabled will not yet have qualified for benefits. See 69 Fed. Reg. at 8605, 8607.

Interpreting the student exemption to encompass full-time employees would undermine FICA's purposes. If the exemption covered persons who are not predominantly students, any employee of a school, college, or

university—from the president to a member of the admissions staff—could exempt himself from FICA tax throughout his career simply by enrolling in classes in his spare time. Interpreting the exemption to encompass apprenticeships and similar jobs that provide employees with professional training would likewise be inconsistent with FICA's purposes. Medical residencies are not the only apprenticeships affiliated with schools, colleges, and universities. Similar residencies are common in other health-related professions, including veterinary medicine. See U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, *Bulletin 2800, Occupational Outlook Handbook* 403 (2010-2011 Library Ed.) (*OOH*). Plumbers and electricians also often begin their careers by serving apprenticeships that combine paid on-the-job training with related classroom instruction. *Id.* at 642, 660. Excluding individuals from FICA coverage during extended periods (petitioners' own residency programs generally range from three to seven years, see p. 3, *supra*) when they are earning salaries for full-time work would reduce the funding available for the Social Security system and could deprive the exempted employees of needed benefits.

b. Petitioners' arguments (Br. 39-40) that the full-time employee rule conflicts with FICA's purposes rest on flawed foundations. Petitioners contend (Br. 39) that, because a physician must complete a residency in order to become certified in a desired specialty or subspecialty, the full-time employee rule inappropriately subjects residents to FICA tax before they have "embarked on their careers." The requirement that employers and employees pay FICA tax, however, depends not on whether a worker has begun a "career," but on whether he is earning "wages" from "employment." 26 U.S.C.

3101, 3111. Under petitioners' logic, any professional or skilled tradesperson who must serve an apprenticeship to qualify for licensure or independent practice ought to be exempt from FICA tax. But that has never been the rule. See Rev. Rul. 69-519, 1969-2 C.B. 185 (apprentices subject to FICA tax).

Nor could the student exemption (however broadly read) be interpreted to exempt all such employees from FICA. The exemption applies only to "service performed in the employ of * * * a school, college, or university" (and certain affiliated organizations). 26 U.S.C. 3121(b)(10). Many apprenticeships—including those served by architects, engineers, and surveyors to qualify for licensure—generally entail employment by firms or individuals rather than schools, colleges, or universities. See *OOH* 152, 158, 165. In any event, petitioners' contention that residents have not yet begun their medical careers ignores the fact that completion of a residency is not required for medical licensure. Instead, most States permit residents to become fully licensed after one year of practice. See Federation of State Med. Bds., *State-specific Requirements for Initial Medical Licensure* (July 2010), http://www.fsmb.org/usmle_eliinitial.html. Once licensed, residents can "moonlight" outside the residency as independent practitioners. J.A. 30a, 199a.

Petitioners are also wrong in arguing (Br. 39-40) that taxing residents under FICA is inappropriate because residents may not be eligible to earn Social Security benefit credits. That assertion is based on a reading of SSA regulations that is directly contrary to the SSA's own longstanding position. "The [SSA] has always held that resident physicians are not students" covered by the student exception in the Social Security Act. SSR

78-3, *supra*. When the Eighth Circuit disagreed with that position in *Minnesota* v. *Apfel*, 151 F.3d 742 (1998), the SSA declined to acquiesce in that ruling outside the Eighth Circuit, reiterating that "[u]nder SSA rules, the services performed by medical residents do not qualify for the student exclusion." Soc. Sec. Acq. Rul. 98-5(8), 63 Fed. Reg. 58,446 (1998). As petitioners themselves note (Br. 40), FICA and the Social Security Act are generally construed in pari materia unless there is a good reason for a divergent interpretation. See *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001); *Rowan Cos.* v. *United States*, 452 U.S. 247, 255 (1981). Accordingly, the SSA's longstanding position that medical residents are not encompassed by the Social Security Act's student exception supports the Treasury Department's conclusion that residents, as full-time employees, are not encompassed by FICA's student exemption.

5. ***The full-time employee rule is consistent with the Treasury's longstanding interpretation of the student exemption***

The Treasury has long interpreted the student exemption as limited to individuals who are predominantly students and whose service as employees is secondary or incidental. See 69 Fed. Reg. at 8606-8607. In 1951, the Treasury adopted regulations limiting the exemption to individuals whose employment services are "incident to and for the purpose of pursuing a course of study," 16 Fed. Reg. at 12,474, and that requirement has remained in the regulations ever since. See T.D. 6190, 1956-2 C.B. 605, 653; T.D. 7373, 1975-2 C.B. 394, 397-398; T.D. 9167, 2005-1 C.B. at 264-265; 26 C.F.R. 31.3121(b)(10)-2(d). During that time, Congress has reenacted or amended

the student exemption several times without disapproving the Treasury's interpretation. See Internal Revenue Code of 1954, ch. 736, § 3121(b)(11)(B), 68A Stat. 422; Social Security Amendments of 1954, Pub. L. No. 54-761, ch. 1206, § 205(b), 68 Stat. 1091; Social Security Amendments of 1972, Pub. L. No. 92-603, § 129(a)(1), 86 Stat. 1359. Indeed, petitioners have not independently challenged the predominance requirement, see Pet. App. 18a, and the district court accepted its validity, see *id.* at 11a, 39a-40a, 64a-65a.

Historically, the Treasury generally determined whether an individual's student activities predominated by conducting a case-specific examination of all relevant facts and circumstances. In applying that approach, the Treasury repeatedly indicated that the number of hours worked is an important factor in determining whether an employee's services are "incident to" his activities as a student and that full-time work is generally inconsistent with student status. See Rev. Rul. 78-17, 1978-1 C.B. at 307 (concluding that services performed by students working "on a part-time basis" were "incident to" their courses of study, but that services performed by an individual "employed on a full-time basis" were not); Rev. Rul. 66-285, 1966-2 C.B. at 456 (stressing part-time nature of employment in concluding that services performed by work-study student were exempt); I.R.S. Gen. Couns. Mem. 37,252 (Sept. 14, 1977) (noting that "the primary concerns under the statute and regulations are the hours worked and the course load taken," and treating the fact that "employment is part-time rather than full-time" as an indication that the work is "incident to and for the purpose of pursuing the course of study"); I.R.S. Tech. Adv. Mem. 9332005 (Aug. 13, 1993) (stating that the critical question is "whether we are

dealing with a student who works or a worker who attends school," and that the "number of employment hours" is an important variable).

The litigation over the status of medical residents spawned by *Apfel* revealed two related inadequacies in the Treasury's traditional approach. First, the litigation revealed confusion about how the predominance requirement applies to full-time employees who are performing services "in the nature of on the job training." 69 Fed. Reg. at 8605. Second, when the Treasury was confronted with approximately 7000 refund claims in the wake of the *Apfel* litigation, it recognized that continued case-by-case analysis of all relevant facts and circumstances would entail an extraordinary administrative burden. See I.R.S. Chief Couns. Advice 200029030 (July 21, 2000) (giving detailed guidance to examining personnel on factual inquiries involved in processing claims) (2000 Advice); I.R.S. Chief Couns. Advice 200212029 (Mar. 22, 2002) (describing procedures adopted, including analyzing a representative sample of cases, to aid processing) (2002 Advice).

In response to those concerns, the Treasury conducted a notice-and-comment rulemaking that culminated in amended regulations. See 69 Fed. Reg. at 8604 (notice of proposed rule-making); T.D. 9167, *supra* (final rule). Those regulations reaffirm the Treasury's longstanding view that "[t]he educational aspect of the relationship between the employer and the employee, as compared to the service aspect of the relationship, must be predominant in order for the employee's services to be incident to and for the purpose of pursuing a course of study." 26 C.F.R. 31.3121(b)(10)-2(d)(3)(i). The regulations further clarify that "[t]he evaluation of the service aspect of the relationship is not affected by the fact

that the services performed by the employee may have an educational, instructional, or training aspect." *Ibid.*

The regulations thus make clear that, in determining whether an individual's predominant status is that of a student, the relevant question is whether the individual is primarily engaged in study rather than remunerative work, not whether the principal benefit of the work is its educational or training value rather than the remuneration it provides. That approach accords with the fact that apprentices, law clerks, and similar workers are not commonly described as "students" even though a major benefit of their jobs is experience and training rather than money. The Treasury's approach to the predominance inquiry also alleviates the administrative difficulties that could arise from an attempt to compare, on a case-by-case basis, the pecuniary and educational benefits provided by a particular job.

As a general matter, the current Treasury regulations maintain in effect the prior understanding that "whether the educational aspect or the service aspect of an employee's relationship with the employer is predominant is determined by considering all the relevant facts and circumstances." 26 C.F.R. 31.3121(b)(10)-2(d)(3)(i). In the application of that general approach, however, the regulations establish a bright-line rule that "[t]he services of a full-time employee are not incident to and for the purpose of pursuing a course of study." 26 C.F.R. 31.3121(b)(10)-2(d)(3)(iii). In that situation, the hours spent in employment are so significant under the facts and circumstances that they are dispositive. And the Treasury reasonably decided to adopt a categorical rule in light of the administrative burden that application of the facts-and-circumstances approach could entail, as well as the importance of workable rules for efficient

implementation of a broadly applicable tax like FICA, see *Lee*, 455 U.S. at 258-259.

This Court has repeatedly held that agencies may adopt categorical rules to address recurring issues of general applicability, as long as the rules are reasonable and consistent with the applicable statutes. *Lopez* v. *Davis*, 531 U.S. 230, 242-244 (2001); *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 612 (1991); see also *United States* v. *Boyle*, 469 U.S. 241, 249 & n.8 (1985). The full-time employee rule satisfies that test. The rule accords with the Treasury's longstanding view that Section 3121(b)(10) is limited to individuals who are predominantly students and that hours worked is an important factor in assessing whether that limitation is met. As explained above, the rule is also supported by the statute's language, context, history, and purpose. Those considerations all indicate that Section 3121(b)(10) is reasonably read as a narrow exemption encompassing students who are performing incidental employment, such as students with part-time jobs that help fund their educations, rather than a broad exemption encompassing full-time employees who are engaged in incidental study, such as medical residents serving apprenticeships to advance their careers. The court of appeals correctly upheld that reasonable interpretation under *Chevron*.

B. Contrary To Petitioners' Contentions, The Full-Time Employee Rule Is Reasonable And Consistent With The Statutory Text

1. Petitioners contend (Br. 20-22) that the court of appeals should not have deferred under *Chevron* because the full-time employee rule "conflict[s] with the plain language of the Student Exemption." Br. 36. Petitioners argue that the word "student" in Section

3121(b)(10) "unambiguously" encompasses any "person who engages in 'study' by applying the mind 'to the acquisition of learning, whether by means of books, observation, or experiment.'" Br. 21-22 (quoting *OUD* 2049-2050). As discussed above, however, the term "student" does not necessarily have that broad meaning, which would encompass numerous employees (including university professors engaged in academic or scientific research) who would not ordinarily be considered "students." Instead, as demonstrated by the very dictionaries on which petitioners rely, the word "student" can have the more limited meaning of someone engaged in formal, academic instruction. See p. 22, *supra* (quoting *OUD* 2049 and *Random House Dictionary* 1888). That narrower meaning is entirely consistent with the Treasury's conclusion that, as used in Section 3121(b)(10), the term "student" does not encompass full-time employees engaged in on-the-job training or serving apprenticeships.

Petitioners also argue (Br. 22) that the statute "unambiguously" precludes limiting eligibility for the student exemption based on how much time an individual spends working because Section 3121(b)(10) contains no explicit language to that effect. As discussed above, however, a close reading of the statutory language supports limiting the exemption to individuals who are predominantly students and whose employment services are only incidental. See pp. 21-22, *supra*. Treasury regulations have long included a predominance requirement for eligibility for the student exemption—a requirement that petitioners have not challenge as a general matter. See Pet. App. 18a. And the Treasury's longstanding position is that hours worked are a significant factor in determining whether the requirement is satisfied. See

pp. 31-32, *supra*. In its recent rulemaking, the Treasury clarified that the predominance inquiry focuses on whether an individual's primary activity is study rather than remunerative work, not whether the principal benefit of the work is its training value rather than the remuneration it provides. See p. 32-33, *supra*. Based on those premises, the Treasury reasonably concluded that employees who work full-time are not predominantly students because they "have filled the conventional measure of available time with work, and not study," and they "are earning wages at a level that exceeds Congress's intended scope for the student FICA exception." 69 Fed. Reg. at 8607.

Acceptance of petitioners' view that anyone engaged in learning qualifies as a "student," no matter how much time that individual spends working, would lead to results that Congress could not have intended. University professors, admissions officers, and bookkeepers could exempt themselves from FICA by enrolling in evening classes. And individuals who ought to be treated equivalently for FICA coverage would be treated inconsistently. For example, most architects, engineers, and surveyors who are serving internships required for licensure would not qualify for the student exemption because their internships are generally served in the employ of firms or individuals rather than schools, colleges, or universities. See p. 29, *supra*. But it is not evident why Congress would have treated those individuals differently for FICA tax purposes than medical residents. Indeed, petitioners' position could lead to inconsistent treatment among residents themselves. Residents employed by schools, colleges, and universities would be exempt from FICA tax, but those em-

ployed by other facilities would not be exempt, even if their work was equally educational.[4]

2. Petitioners are also mistaken in contending (Br. 34-35) that the full-time employee rule is arbitrary. Petitioners first assert that the rule arbitrarily focuses on the "*amount* of time" that an individual spends learning whereas "the relevant issue is *what* the person does and *why*—not *how long* the person does it." Br. 34. As explained above, however, focusing on how much time an individual spends working is not arbitrary; it reflects statutory and policy considerations that justify construing the student exemption as limited to individuals who are predominantly students and only incidentally employees.

Petitioners next claim that the full-time employee rule draws an "insupportable distinction between students who learn through hands-on training and students who learn through classroom instruction and textbooks." Br. 35. But the statute expressly limits the exemption to students who are "regularly attending *classes*." 26 U.S.C. 3121(b)(10) (emphasis added). In any event, the full-time employee rule does not distinguish between students who learn through hands-on training and students who learn through classroom instruction. The rule

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[4] In the courts below, Mayo advocated a broad definition of "school, college, or university" that would encompass most hospitals offering residency programs. See Pet. App. 32a-33a. That definition is contrary to the amended regulations, which define the phrase as encompassing only institutions whose "primary function" is the presentation of formal instruction. 26 C.F.R. 31.3121(b)(10)-2(c). The validity of that component of the regulations is not before this Court. See note 1, *supra*. But, if the Treasury's full-time employee rule were overturned, and both the terms "student" and "school, college, and university" were given the broad definitions that Mayo advocates, the student exemption would have an extraordinary sweep that Congress could not have intended.

instead distinguishes between individuals who are predominantly students and those who are paid, full-time employees.

The Treasury's determination that full-time employees are not transformed into students by the receipt of on-the-job training as part of their paid work, or because their work is otherwise educational, is entirely reasonable. That determination is consistent with the statutory language, which suggests that term "student" means someone engaged in formal, academic instruction rather than anyone engaged in learning. See pp. 22-23, *supra*. The Treasury's determination is also consistent with the exemption's limitation to employees of "school[s], college[s], and universit[ies]," 26 U.S.C. 3121(b)(10), which indicates that it is not intended as a broad exclusion for all apprentices and interns. And the Treasury's determination is consistent with FICA's purposes and the legislative history, both of which support limiting the student exemption to individuals working only part-time or intermittently.

C. The Student Exemption Does Not Unambiguously Encompass Petitioners' Medical Residents

Apart from their arguments that the full-time employee rule is arbitrary and inconsistent with the meaning of the word "student," petitioners devote comparatively little of their brief to addressing whether the rule reasonably interprets Section 3121(b)(10). Instead, petitioners primarily argue (Br. 19-33) that their medical residents unambiguously satisfy the definition of "student" that petitioners themselves have selected. Because the definition of "student" that petitioners have chosen is untethered to the language, context, and purposes of Section 3121(b)(10), and inconsistent with the

Treasury's reasonable regulations, petitioners' contention that their residents meet that definition is largely beside the point. In any event, petitioners' argument that their residents unambiguously qualify for the student exemption is unpersuasive for two additional reasons. First, petitioners ignore FICA's historical development, which indicates that Congress did not intend medical residents to qualify for the exemption. Second, petitioners' arguments that residents are unambiguously students are flawed on their own terms.

1. FICA's historical development indicates that residents are not covered by the student exemption

a. In 1939, at the same time that it enacted the student exemption, Congress also enacted several other exemptions from FICA tax. One of those exemptions was for "service performed as an interne in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to State law." 1939 Act § 606, 53 Stat. 1385 (26 U.S.C. 1426(b)(13) (1940)). At that time, an "intern" was an individual participating in a one-year training program required for admission into a residency program. 2000 Advice 2 n.3.[5] The enactment of the intern exemption, and its subsequent repeal, see Old-Age, Survivors, and Disability Insurance Amendments of 1965 (1965 Amendments), Pub. L. No. 89-97, Tit. III, § 311(b)(5), 79 Stat. 381, both suggest that Congress did not intend medical residents to qualify for the student exemption.

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[5] Internship programs were discontinued in 1975, and residency programs have since included physicians in their first year of post-graduate training. First-year residents are now often called interns. 2000 Advice 2 n.3.

The committee reports accompanying the enactment of the intern exemption make clear that Congress made a considered decision to limit it to interns and not also to exempt medical residents. *1939 House Report* 49 (stating that the exemption applies to "service performed as an interne (as distinguished from a resident doctor)"); *1939 Senate Report* 58 (same). From the intern exemption's enactment through its repeal, Treasury regulations reflected that understanding, expressly stating that the exemption did not encompass services provided by residents. See 5 Fed. Reg. 787 (1940); T.D. 6190, 1956-2 C.B. at 655; 25 Fed. Reg. 13,051 (1960); T.D. 6983, 1969-1 C.B. 228, 233. In *St. Luke's Hospital Ass'n* v. *United States*, 333 F.2d 157 (1964), cert. denied, 379 U.S. 963 (1965), the Sixth Circuit upheld the Treasury's interpretation, agreeing that Congress intended to exclude residents from coverage under the intern exemption.

Congress's considered decision to exclude residents from coverage under the intern exemption would have been a pointless gesture if residents were already excluded from FICA tax under the student exemption. Indeed, the intern exemption itself would have been largely unnecessary if medical residents were unambiguously covered by the student exemption. If residents were unambiguously "students," interns likewise would have been "students," and Congress would have had little need to enact a separate exemption to exclude them from FICA coverage.[6]

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[6] In *United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1253 (2007), the Eleventh Circuit suggested that the intern exemption may have been designed to encompass interns who did not qualify for the student exemption because they were employed by a hospital that was not a "school, college, or university." Congress would have

b. The 1965 Amendments, which repealed the intern exemption as well as various other exemptions that applied to doctors, also support the conclusion that medical residents are not encompassed by the student exemption. Those amendments were prompted by congressional concern that many doctors and their families were being deprived of needed disability and survivorship benefits because of exemptions from FICA and the Social Security Act. See H.R. Rep. No. 213, 89th Cong., 1st Sess. 95 (1965) (*1965 House Report*); S. Rep. No. 404, 89th Cong., 1st Sess. Pt. I, at 111 (1965) (*1965 Senate Report*); 111 Cong. Rec. 16,106-16,107 (1965). Explaining the reasons for repealing the intern exemption, the committee reports stated that "[t]he coverage of services as an intern would give young doctors an earlier start in building up social security protection and would help many of them to become insured under the program at a time when they need the family survivor and disability protection it provides." *1965 House Report* 95; *1965 Senate Report* 112. Repealing the intern exemption would not have accomplished that purpose if most (or even many) interns, as well as residents, would have been excluded from coverage by the student exemption.[7]

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had no evident reason, however, to exempt *all* interns from FICA tax regardless of the sites at which they worked, while exempting residents from FICA tax only if they worked at schools, colleges, or universities. Moreover, under the broad definition espoused by Mayo, see note 4, *supra*, virtually any hospital sponsoring an internship or residency program would qualify as a "school, college, or university," so the Eleventh Circuit's theory would still leave the intern exemption without any significant function.

[7] In *United States* v. *Memorial Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 30 (2009), the Second Circuit noted the committee reports' acknowledgment that some interns might qualify for a FICA exemption under other statutory provisions. But the only provision mentioned was

Moreover, at the same time that it repealed the intern exemption, Congress repealed or narrowed other FICA exemptions that had previously applied to doctors. In particular, Congress repealed an exemption for self-employed physicians and expressly excluded "medical [and] dental resident[s] in training" from exemptions for certain employees of medical facilities operated by the federal and D.C. governments. 1965 Amendments §§ 311(b)(1) and (4), 317(b)(3), 79 Stat. 381, 389; see *1965 House Report* 215-216, 225; *1965 Senate Report* 237, 243-244. In making those legislative changes, Congress demonstrated an intent that FICA cover doctors at all stages of their careers, starting with their internships and continuing through their residencies into private practice. See 69 Fed. Reg. at 8608.[8]

2. ***Petitioners' additional arguments are unpersuasive***

In addition to ignoring statutory developments indicating that residents are not covered by the student ex-

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the former exemption in 26 U.S.C. 3121(b)(8)(B) (1964) for services performed for tax-exempt organizations. *1965 House Report* 215; *1965 Senate Report* 238. If the committees had believed that most interns would remain exempt from FICA under the student exemption, the reports surely would have mentioned that possibility.

[8] The provisions excluding residents who work at federal and D.C. medical facilities from FICA exemptions applicable to other employees of those facilities remain in effect today. 26 U.S.C. 3121(b)(6)(B) and (7)(C)(ii). There is no evident reason that Congress would require medical residents at federal and D.C. facilities to pay FICA tax while exempting residents employed by schools, colleges, and universities. And, if petitioners' view of the student exemption were combined with Mayo's broad conception of the term "school, college, or university," Congress's decision to make the Section 3121(b)(6)(B) and (7)(C)(ii) exemptions unavailable to federal and D.C. medical residents would be largely pointless, since those residents would qualify for the student exemption in any event.

emption, petitioners' arguments that their residents must be viewed as "students" are flawed on their own terms.

a. Petitioners first suggest (Br. 23-24) that their residents are necessarily "students" because their "rotations"—sequential assignments to different facilities or practice areas—are "classes" within the meaning of Section 3121(b)(10). As an initial matter, both the statute and the Treasury's regulations make clear that class attendance, by itself, does not qualify an individual for the student exemption. 26 U.S.C. 3121(b)(10) (requiring both that a qualifying individual be a "student" and that he be "regularly attending classes"); 26 C.F.R. 31.3121(b)(10)-2(d) (explaining that, "to have the status of a student," an individual must be pursuing "a course of study" and his employment services must be "incident to and for the purpose of pursuing [that] course of study").

In any event, rotations are not classes; they are work—recurring periods during which residents are paid to care for patients. Cf. 26 C.F.R. 31.3121(b)(10)-2(d)(1) (stating that "a class is an instructional activity led by a faculty member or other qualified individual").[9] During rotations, residents spend 50 to 80 hours a week providing patient care. For many hours of the day, residents are the only physicians directly treating patients. In some disciplines, supervising physicians are generally present at the hospital for only two or three hours each

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[9] Although its regulations recognize that "classes" may include some activities conducted outside the "[t]raditional classroom," such as faculty-supervised research required for an academic degree, 26 C.F.R. 31.3121(b)(10)-2(d)(1), the Treasury has never suggested that an individual could "attend[] classes" by providing paid services that are not part of a degree program.

day. From the beginning of their residencies, residents may examine and diagnose patients, order laboratory tests and prescribe medications, and perform medical procedures without first consulting attending physicians. Residents' services may include life-saving diagnoses and treatment. While on rotations, residents spend some of their time in activities, such as lectures and conferences, that may more closely resemble "classes." But those activities occupy only a small percentage of residents' time, and residents can skip them if the exigencies of patient care so require. See pp. 4-5, *supra*.[10]

b. Petitioners next assert (Br. 24-25) that residents are "students" because completing a residency is necessary for board certification in a specialty, which is often required for a doctor to obtain hospital privileges. As discussed above, however, completion of a residency is not required for a physician to obtain a license. Instead, most States permit residents to become fully licensed after one year of post-graduate training, and once licensed, residents may practice independently outside their residency. Moreover, although most physicians choose to obtain board certification, it is not required for a physician to treat patients, and 15% of American physicians are not board-certified. See Ass'n of Am. Med. Colleges Amicus Br. 10. In any event, many professions, including architecture and engineering, require practitioners to serve internships or obtain on-the-job training

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[10] Petitioners' reliance (Br. 24) on *Thomas Jefferson University* v. *Shalala*, 512 U.S. 504, 507 (1994), is misplaced. The Court in that case merely recognized that medical residents "learn" in the course of "treating patients." *Ibid.* The Court neither stated that residents attend "classes" nor expressed a view on whether residents are "students" within the meaning of Section 3121(b)(10).

as a prerequisite to licensure, but those practitioners are not "students" covered by Section 3121(b)(10)'s FICA tax exemption.

c. Petitioners also argue (Br. 25-26) that residents qualify as "students" because their purpose for participating in residency programs is predominantly educational. Section 3121(b)(10), however, contains no indication that "student" status turns on a taxpayer's "subjective reasons for engaging in certain activities," and the Treasury has rejected that approach as impractical. 2002 Advice 7. Petitioners assert (Br. 26) that residents do not choose a residency based on salary or benefits but instead select the program that they believe will be most educational or will best advance their careers. And petitioners observe (*ibid.*) that a resident generally does not expect to obtain permanent employment at the institution sponsoring his residency. But the same observations apply to individuals serving in many other apprenticeship-type jobs, including judicial law clerks, yet those employees are not considered "students."

Residents earn substantial salaries, comparable to the national median household income. Compare p. 5, *supra* (petitioners' residents earn between $41,000 and $56,000) with U.S. Census Bureau, U.S. Dep't of Commerce, *Median Household Income for States: 2007 and 2008 American Community Surveys* 2 (Sept. 2009), http://www.census.gov/prod/2009pubs/acsbr08-2.pdf (2008 median household income was approximately $52,000). And residents receive significant employee benefits, including health insurance and paid vacation time. See pp. 5-6, *supra*. Those forms of compensation are the hallmarks of employment, even assuming that residents typically attach even greater importance to

the training and opportunities for professional growth that their residencies provide.

d. Petitioners also contend that, as sponsors, they operate residency programs "purely for *educational* purposes." Br. 26. Petitioners' subjective reasons for employing residents, however, are as irrelevant to whether residents are "students" as are residents' motivations for accepting employment. Moreover, although petitioners assert that residents "do not provide a net economic benefit," Br. 27, nothing in Section 3121(b)(10) suggests that "student" status turns on whether the employing institution profits from the services provided. In any event, although residents (like many new employees) may be less efficient than more experienced physicians, "[r]esidents earn a stipend because they provide patient care and perform other services that are of value to the hospital." Medicare Payment Advisory Comm'n, *Rethinking Medicare's Payment Policies for Graduate Medical Education and Teaching Hospitals* 8 (Aug. 1999), http://www.aamc.org/advocacy/teachhosp/medpac/rethinkingmedicare.pdf (*MedPAC Report*). Courts have widely recognized that residents' stipends are not scholarships but compensation for services they render. See *Field* v. *Commissioner*, 680 F.2d 510, 513 (7th Cir. 1982) (collecting cases). When ACGME required residency programs to curtail the hours worked by residents, hospitals were required to hire additional staff to provide the patient care that residents could no longer provide. J.A. 113a-114a. And one recent study indicates that further reductions in resident workloads recommended by the Institute of Medicine would cost residency programs approximately $1.6 billion because of the need to shift to other providers the responsibility for patient care that is currently provided by residents. See Teryl K. Nuck-

ols et al., *Cost Implications of Reduced Work Hours and Workloads for Resident Physicians*, New Eng. J. of Med., May 21, 2009, at 2202, 2209 (*NEJM Study*).

Petitioners' contention that residents do not perform work that "lacks educational value" (Br. 27) is also inaccurate. Studies indicate that residents "spend 9 to 24 hours per week on noneducational tasks that lower-level providers can perform." *NEJM Study* 2204. Residents continue to perform procedures after completing the minimum number required for their training by ACGME. J.A. 205a. And a resident's refusal to perform a procedure on the ground that he had already learned how to perform it "would result in major disciplinary action." J.A. 54a. Nor does the fact that Medicare compensates hospitals for higher operational costs associated with residency programs indicate that residents are "students." See Pet. Br. 28–29. Medicare reimburses the costs of residency programs because those programs "enhance the quality of care" and their costs "should be considered as an element in the cost of patient care." *1965 House Report* 32; *1965 Senate Report* 36; see *MedPAC Report* 6 ("[T]he direct and indirect costs" of residency programs "both represent costs of providing patient care.").

c. In a kind of reverse bootstrapping, petitioners argue (Br. 29-30) that residents are students because the curriculum for the third and fourth years of medical school consists principally of clinical work. The fact that medical school includes a clinical component, however, does not transform residents back into the students they once were. Unlike medical students, residents are doctors who have graduated from medical school, and they are paid for providing patient care. Moreover, residents have significantly greater responsibilities than medical

students even on the first day of their residencies. J.A. 110a-111a; 2002 Advice 22.[11]

f. Finally, petitioners' assertion (Br. 31-33) that medical residents are widely classified as "students" by Congress and the courts is an inaccurate generalization.

The statutes cited by petitioners (Br. 31) do not establish that Congress uniformly views residents as "students." Under 5 U.S.C. 5102(c)(16) and 5351(2)(A), "residents-in-training" employed by the federal and D.C. governments are described as "student-employee[s]." But that classification does not indicate that those residents are predominantly students rather than employees, which would be necessary for them to qualify as "students" under Section 3121(b)(10). On the contrary, those residents are specifically made *subject to* FICA tax by 26 U.S.C. 3121(b)(6)(B) and (7)(C)(ii), which deem their services as "employee[s]" to be covered "employment." See note 8, *supra*. And 15 U.S.C. 37b(b)(1)(D)'s definition of "student"—"any individual who *seeks to be admitted* to a graduate medical education program"—does not include residents, who have already been admitted. Instead, Section 37b(b)(1)(D) describes individuals still in medical school who are applying to, but are not yet participants in, residency programs.

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[11] Contrary to petitioners' contention (Br. 29-30), *Board of Curators* v. *Horowitz*, 435 U.S. 78 (1978), and *Regents of the Univ. of Mich.* v. *Ewing*, 474 U.S. 214 (1985), do not support their arguments. Those cases concerned students who had not yet graduated from medical school, and they presented questions concerning the process the Constitution demands before such students may be dismissed from state-operated schools. The Court's decisions in *Horowitz* and *Ewing* have no bearing on the very different question whether residents, who have already graduated from medical school, are "students" within the meaning of Section 3121(b)(10).

Numerous other statutes, moreover, characterize residents as "employees" rather than students. Most directly relevant are the FICA and Social Security Act provisions stating that services provided by medical residents as "employee[s]" of the United States and the District of Columbia constitute covered "employment." See 26 U.S.C. 3121(b)(6)(B) and (7)(C)(ii), 42 U.S.C. 410(a)(6)(B) and (D)(ii); note 8, *supra*. Statutes governing Veterans Administration (VA) residency programs also characterize residents as employees rather than students. See 38 U.S.C. 7405(a)(1)(D) (distinguishing between "residents" and "students"), 7406(b) (referring to "employment" of residents).

Courts and agencies similarly have concluded that residents are "employee[s]" entitled to engage in collective bargaining under state and federal statutes. See, *e.g.*, *Regents of the Univ. of Cal.* v. *Public Employees Relations Bd.*, 715 P.2d 590 (Cal. 1986) (*Regents*); *University Hosp.* v. *State Employment Relations Bd.*, 587 N.E.2d 835 (Ohio 1992); *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152 (1999) (*BMC*); *Physicians Nat'l Housestaff Ass'n*, 7 F.L.R.A. 434 (1981). Several of those courts have specifically held that residents do not fall within exemptions for "students," reasoning that their employment responsibilities, rather than their educational activities, predominate. *Regents*, 715 P.2d at 601-6604; *University Hosp.*, 587 N.E.2d at 839-840; see also *BMC*, *supra* (holding that residents are "employees" under the National Labor Relations Act, 29 U.S.C. 152(3), despite precedent—recently reaffirmed in *Brown Univ.*, 342 N.L.R.B. 483 (2004)—that individuals who

are "primarily students" are not statutory "employees").[12]

D. Petitioners' Reliance On *National Muffler* Is Misplaced

Petitioners also contend (Br. 36-44) that the Treasury's full-time employee rule is invalid under the multifactor test set forth in *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472 (1979). The validity of the regulation is not properly determined under *National Muffler*, however, because that decision has been superseded by *Chevron*, and the considerations on which petitioners rely are largely irrelevant to *Chevron* analysis.

When it decided *National Muffler*, this Court had not fully developed its approach to judicial review of federal agency regulations. The Court in *Chevron* subsequently clarified the appropriate analysis, holding that courts must defer to an interpretation embodied in an agency's regulation if the statute does not directly address the question at issue and the agency's interpretation reflects a permissible construction of the statute. 467 U.S. at 842-843. In *United States* v. *Mead Corp.*, 533 U.S. 218, 229-230 (2001), the Court further clarified that *Chevron*'s analysis applies whenever an agency with authority to engage in notice-and-comment rulemaking

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[12] Petitioners are also wrong in stating that "[f]our circuits have held that medical residents enrolled and regularly attending classes at a sponsoring institution unambiguously qualify for the Student Exemption." Br. 32. Those courts did not hold that residents "unambiguously qualify" for the exemption. They held only that "the statute unambiguously does not categorically exclude medical residents from eligibility," and they remanded for factual proceedings to determine whether the particular residents at issue were exempt. *University of Chi. Hosps.* v. *United States*, 545 F.3d 564, 570 (7th Cir. 2008); see *Sloan-Kettering*, 563 F.3d at 27-28; *United States* v. *Detroit Med. Ctr.*, 557 F.3d 412, 417-418 (6th Cir. 2009); *Mount Sinai*, 486 F.3d at 1252-1253.

uses that authority to address a gap, whether implicit or explicit, in a statute that the agency administers.

The Treasury is authorized by 26 U.S.C. 7805(a) to "prescribe all needful rules and regulations for the enforcement of" the Internal Revenue Code, including the Code provisions added by FICA. The agency exercised that authority when it used notice-and-comment rulemaking to promulgate the full-time employee rule. 69 Fed. Reg. at 8604; T.D. 9167, *supra*. Accordingly, the rule's validity should be evaluated under the *Chevron* test. See *Swallows Holding, Ltd.* v. *Commissioner*, 515 F.3d 162, 168-170 (3d Cir. 2008) (*Chevron*, rather than *National Muffler*, governs the validity of Treasury regulations promulgated using notice-and-comment rulemaking).

This Court has applied *Chevron* in evaluating the validity of other Treasury regulations. *Atlantic Mut. Ins. Co.* v. *Commissioner*, 523 U.S. 382, 387-389 (1998); *Boyle*, 469 U.S. at 246 n.4. And, although the Court has occasionally cited *National Muffler* for the general proposition that a Treasury regulation will be upheld if it is reasonable, the Court has not, since *Chevron*, subjected any Treasury regulation to the full multi-factor test in *National Muffler*. See *Cleveland Indians Baseball Co.*, 532 U.S. at 219; *Cottage Sav. Ass'n* v. *Commissioner* 499 U.S. 554, 560-561 (1991).

Some of the *National Muffler* factors overlap with considerations relevant under *Chevron*. In particular, "the plain language of the statute, its origin, and its purpose," *National Muffler*, 440 U.S. at 477, shed light on whether the statute directly resolves the issue addressed by a regulation and, if not, whether the regulation reflects a permissible construction of the statute. But, contrary to petitioners' arguments (Br. 37-40), the

language, origin, and purpose of Section 3121(b)(10) all indicate that the full-time employee rule is a permissible construction of that provision. See pp. 24-30, *supra*.

The other *National Muffler* factors on which petitioners rely (Br. 40-44) are largely irrelevant under *Chevron* to the validity of the full-time employee rule. Thus, although petitioners contend (Br. 40-41, 42) that the reasonableness of the rule is undermined by the recency of its adoption, this Court has held that, under *Chevron*, "neither antiquity nor contemporaneity with the statute is a condition of [a regulation's] validity." *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740 (1996). The fact that Congress has not directly "scrutiniz[ed]" the rule (Pet. Br. 42) (quoting *National Muffler*, 440 U.S. at 477) likewise has no bearing on whether it is "a permissible construction of the statute." *Chevron*, 467 U.S. at 843. In any event, the full-time employee rule is a refinement of the predominance requirement, which has been in the Treasury's regulations for almost 60 years and has not been disapproved by Congress, despite repeated reenactments and amendments of the relevant statutory provision.

Petitioners also argue that the full-time employee rule is unreasonable because it was enacted "to overturn judicial decisions" interpreting the student exemption. Br. 41-42. Under *Chevron*, however, agencies may adopt regulations that reject prior judicial decisions provided the regulations reflect a reasonable interpretation of an ambiguous statute. See *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-985 (2005) (*Brand X*); see also *Smiley*, 517 U.S. at 741 (The fact that a "regulation was prompted by litigation" is "irrelevant.").

Finally, petitioners contend (Br. 42-44) that the full-time employee rule is unreasonable because the Treasury's interpretation of the student exemption has purportedly been inconsistent. Under *Chevron*, however, the fact that an agency has changed its position "is not fatal" so long as the agency provides a reasoned explanation for its current interpretation. *Smiley*, 517 U.S. at 742; see *Brand X*, 545 U.S. at 981-982; *Chevron*, 467 U.S. at 863-864. Here, the Treasury provided a detailed explanation of the reasons behind its adoption of the full-time employee rule. See 69 Fed. Reg. at 8604-8605, 8606-8608.

Moreover, although the Treasury's approach has evolved in certain respects, its interpretation of the student exemption has been consistent. As discussed above, the Treasury has always interpreted the exemption as limited to individuals who are predominantly students and only incidentally employees. That interpretation has been reflected for nearly 60 years in Treasury regulations requiring that a qualifying individual's employment services be "incident to" the individual's student activities. And although the Treasury historically used a case-by-case, facts-and-circumstances approach to determine if the predominance requirement was met, the Treasury repeatedly indicated that the number of hours worked was a relevant factor and that full-time employees generally did not satisfy the requirement. Based on its experience in dealing with a deluge of refund claims after *Apfel*, the Treasury qualified its case-by-case approach by adopting a categorical rule to address full-time employees, including those whose work has a training or educational component. The adoption of a categorical rule to address that recurring situation was entirely reasonable. See pp. 33-34, *supra*.

Nor has the government been inconsistent on the specific question whether medical residents qualify for the student exemption. Long before *Apfel*, the SSA expressed the view that residents are not covered by the student exception. SSR 78-3, *supra*. And the government's position that residents are covered under FICA was widely accepted, as evidenced by the fact that *Apfel* triggered approximately 7000 refund claims, including claims seeking the return of more than $480 million in FICA taxes paid with respect to residents for periods before *Apfel* was decided.[13] As petitioners acknowledge (Br. 43), in litigating refund claims, Treasury has consistently taken the position that residents do not qualify for the student exemption, even under the prior regulations. The Chief Counsel Advices cited by petitioners are not inconsistent with that view (and are, in any event, non-binding, internal guidance for agency personnel, see 26 U.S.C. 6110(k)(3)). The Advices recognized that the prior regulations took a facts-and-circumstances approach to determining student status, but they did not suggest that residents would qualify for the exemption under that approach. On the contrary, the 2000 Advice expressed doubt that residents could qualify, 2000 Advice 25 n.44, and the 2002 Advice concluded,

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[13] We are informed by the IRS that, after the decision in *Apfel*, many taxpayers filed protective refund claims seeking refunds of $1 or a similar nominal amount. Such claims did not apprise the IRS of the actual amount of FICA taxes paid for the applicable tax periods. Thus, while the total face amount of the relevant refund claims was approximately $480 million, the actual amount of FICA taxes paid by all taxpayers seeking refunds for periods before *Apfel* appears to have been significantly greater.

based on a review of a representative sample of cases, that residents could not qualify, 2002 Advice 66.[14]

Petitioners are also incorrect in asserting (Br. 13, 43) that the Treasury has now "conceded" that residents were "students" under the prior regulations. For administrative reasons, the Treasury decided to settle claims pending under the prior regulations by "accept[ing] the position" that residents were exempt from FICA under Section 3121(b)(10) for periods ending prior to April 1, 2005, when the amended regulations took effect. I.R.S. News Release IR-2010-25 (Mar. 2, 2010), http://www.irs.gov/pub/irs-tege/nr-2010_25.pdf. The Treasury's decision to settle the pending claims on that basis did not constitute a legal concession about the correct interpretation of the prior regulations or the statute. Instead, it reflected a practical determination that continuing to litigate each residency program's claim on its particular facts and circumstances was not a wise expenditure of financial or administrative resources, especially since the amended regulations, including the full-time employee rule, had clarified the issue on a prospective basis.

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[14] Rev. Proc. 98-16, which expressly states that "the services performed by [residents] cannot be assumed to be incidental to and for the purpose of pursuing a course of study," 1998-1 C.B. 403, is also fully consistent with the view that residents do not qualify for the exemption.

CONCLUSION

The judgment of the court of appeals is correct and should be affirmed.

Respectfully submitted.

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[*] The Acting Solicitor General is recused in this case.

APPENDIX

1. Section 3101 of Title 26, United States Code, provides, in pertinent part:

Rate of tax

(a) Old-age, survivors, and disability insurance

In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

* * * * *

(b) Hospital insurance

In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

* * * * *

2. Section 3111 of Title 26, United States Code, provides, in pertinent part:

Rate of Tax

(a) Old age, survivors, and disability insurance

In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percen-

tages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

* * * * *

(b) Hospital insurance

In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

* * * * *

3. Section 3121 of Title 26, United States Code, provides, in pertinent part:

Definitions

(a) Wages

For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; * * *

* * * * *

(b) Employment

For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either,

(i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 233 of the Social Security Act; except that such term shall not include—

* * * * *

(10) service performed in the employ of—

(A) a school, college, or university, or

(B) an organization described in section 509(a)(3) if the organization is organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university and is operated, supervised, or controlled by or in connection with such school, college, or university, unless it is a school, college, or university of a State or a political subdivision thereof and the services performed in its employ by a student referred to in section 218(c)(5) of the Social Security Act are covered under the agreement between the Commis-

sioner of Social Security and such State entered into pursuant to section 218 of such Act;

if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university;

* * * * *

4. For services performed before April 1, 2005, 26 C.F.R. 31.3121(b)(10)-2 (2004) provides, in pertinent part:

Services performed by certain students in the employ of a school, college, or university, or of a nonprofit organization auxiliary to a school, college, or university.

(a) (1) Services performed in the employ of a school, college, or university (whether or not such organization is exempt from income tax) is excepted from employment, if the services are performed by a student who is enrolled and is regularly attending classes at such school, college, or university.

* * * * *

(b) For purposes of this exception, the amount of remuneration for services performed by the employee in the calendar quarter, the type of services performed by the employee, and the place where the services are performed are immaterial. The statutory tests are (1) the character of the organization in the employ of which the services are performed as a school, college, or university, * * * and (2) the status of the employee as a student enrolled and regularly attending classes at the

school, college, or university by which he is employed or with which his employer is affiliated.

(c) The status of the employee as a student performing the services shall be determined on the basis of the relationship of such employee with the organization for which the services are performed. An employee who performs services in the employ of a school, college, or university, as an incident to and for the purpose of pursuing a course of study at such school, college, or university has the status of a student in the performance of such services.

(d) The term "school, college, or university" within the meaning of this exception is to be taken in its commonly or generally accepted sense.

* * * * *

5. For services performed on or after April 1, 2005, 26 C.F.R. § 31.3121(b)(10)-2 provides in pertinent part:

Services performed by certain students in the employ of a school, college, or university, or of a nonprofit organization auxiliary to a school, college, or university.

(a) *General rule.* (1) Services performed in the employ of a school, college, or university within the meaning of paragraph (c) of this section (whether or not the organization is exempt from income tax) are excepted from employment, if the services are performed by a student within the meaning of paragraph (d) of this section who is enrolled and is regularly attending classes at the school, college, or university.

* * * * *

(b) *Statutory tests.* For purposes of this section, if an employee has the status of a student within the meaning of paragraph (d) of this section, the amount of remuneration for services performed by the employee, the type of services performed by the employee, and the place where the services are performed are not material. The statutory tests are:

(1) The character of the organization in the employ of which the services are performed as a school, college, or university within the meaning of paragraph (c) of this section, or as an organization described in paragraph (a)(2) of this section, and

(2) The status of the employee as a student enrolled and regularly attending classes within the meaning of paragraph (d) of this section at the school, college, or university within the meaning of paragraph (c) of this section by which the employee is employed or with which the employee's employer is affiliated within the meaning of paragraph (a)(2) of this section.

(c) *School, College, or University.* An organization is a *school, college, or university* within the meaning of section 3121(b)(10) if its primary function is the presentation of formal instruction, it normally maintains a regular faculty and curriculum, and it normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on. See section 170(b)(1)(A)(ii) and the regulations thereunder.

(d) *Student Status—general rule.* Whether an employee has the status of a student performing the services shall be determined based on the relationship of the employee with the organization employing the employee. In order to have the status of a student, the em-

ployee must perform services in the employ of a school, college, or university within the meaning of paragraph (c) of this section at which the employee is enrolled and regularly attending classes in pursuit of a course of study within the meaning of paragraphs (d)(1) and (2) of this section. In addition, the employee's services must be incident to and for the purpose of pursuing a course of study within the meaning of paragraph (d)(3) of this section at such school, college, or university. An employee who performs services in the employ of an affiliated organization within the meaning of paragraph (a)(2) of this section must be enrolled and regularly attending classes at the affiliated school, college, or university within the meaning of paragraph (c) of this section in pursuit of a course of study within the meaning of paragraphs (d)(1) and (2) of this section. In addition, the employee's services must be incident to and for the purpose of pursuing a course of study within the meaning of paragraph (d)(3) of this section at such school, college, or university.

(1) *Enrolled and regularly attending classes.* An employee must be enrolled and regularly attending classes at a school, college, or university within the meaning of paragraph (c) of this section at which the employee is employed to have the status of a student within the meaning of section 3121(b)(10). An employee is enrolled within the meaning of section 3121(b)(10) if the employee is registered for a course or courses creditable toward an educational credential described in paragraph (d)(2) of this section. In addition, the employee must be regularly attending classes to have the status of a student. For purposes of this paragraph (d)(1), a class is an instructional activity led by a faculty member or other qualified individual hired by the

school, college, or university within the meaning of paragraph (c) of this section for identified students following an established curriculum. Traditional classroom activities are not the sole means of satisfying this requirement. For example, research activities under the supervision of a faculty advisor necessary to complete the requirements for a Ph.D. degree may constitute classes within the meaning of section 3121(b)(10). The frequency of these and similar activities determines whether an employee may be considered to be regularly attending classes.

(2) *Course of study.* An employee must be pursuing a course of study in order to have the status of a student. A course of study is one or more courses the completion of which fulfills the requirements necessary to receive an educational credential granted by a school, college, or university within the meaning of paragraph (c) of this section. For purposes of this paragraph, an educational credential is a degree, certificate, or other recognized educational credential granted by an organization described in paragraph (c) of this section. A course of study also includes one or more courses at a school, college or university within the meaning of paragraph (c) of this section the completion of which fulfills the requirements necessary for the employee to sit for an examination required to receive certification by a recognized organization in a field.

(3) *Incident to and for the purpose of pursuing a course of study.* (i) *General rule.* An employee's services must be incident to and for the purpose of pursuing a course of study in order for the employee to have the status of a student. Whether an employee's services are incident to and for the purpose of pursuing a course of

study shall be determined on the basis of the relationship of the employee with the organization for which such services are performed as an employee. The educational aspect of the relationship between the employer and the employee, as compared to the service aspect of the relationship, must be predominant in order for the employee's services to be incident to and for the purpose of pursuing a course of study. The educational aspect of the relationship is evaluated based on all the relevant facts and circumstances related to the educational aspect of the relationship. The service aspect of the relationship is evaluated based on all the relevant facts and circumstances related to the employee's employment. The evaluation of the service aspect of the relationship is not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect. Except as provided in paragraph (d)(3)(iii) of this section, whether the educational aspect or the service aspect of an employee's relationship with the employer is predominant is determined by considering all the relevant facts and circumstances. Relevant factors in evaluating the educational and service aspects of an employee's relationship with the employer are described in paragraphs (d)(3)(iv) and (v) of this section respectively. There may be facts and circumstances that are relevant in evaluating the educational and service aspects of the relationship in addition to those described in paragraphs (d)(3)(iv) and (v) of this section.

* * * * *

(iii) *Full-time employee.* The services of a full-time employee are not incident to and for the purpose of pursuing a course of study. The determination of whether an employee is a full-time employee is based on the em-

ployer's standards and practices, except regardless of the employer's classification of the employee, an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee. An employee's normal work schedule is not affected by increases in hours worked caused by work demands unforeseen at the start of an academic term. However, whether an employee is a full-time employee is reevaluated for the remainder of the academic term if the employee changes employment positions with the employer. An employee's work schedule during academic breaks is not considered in determining whether the employee's normal work schedule is 40 hours or more per week. The determination of an employee's normal work schedule is not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect.

(iv) *Evaluating educational aspect.* The educational aspect of an employee's relationship with the employer is evaluated based on all the relevant facts and circumstances related to the educational aspect of the relationship. The educational aspect of an employee's relationship with the employer is generally evaluated based on the employee's course workload. Whether an employee's course workload is sufficient in order for the employee's employment to be incident to and for the purpose of pursuing a course of study depends on the particular facts and circumstances. A relevant factor in evaluating an employee's course workload is the employee's course workload relative to a full-time course workload at the school, college or university within the meaning of paragraph (c) of this section at which the employee is enrolled and regularly attending classes.

(v) *Evaluating service aspect.* The service aspect of an employee's relationship with the employer is evaluated based on the facts and circumstances related to the employee's employment. Services of an employee with the status of a full-time employee within the meaning of paragraph (d)(3)(iii) of this section are not incident to and for the purpose of pursuing a course of study. Relevant factors in evaluating the service aspect of an employee's relationship with the employer are described in paragraphs (d)(3)(v)(A), (B), and (C) of this section.

(A) *Normal work schedule and hours worked.* If an employee is not a full-time employee within the meaning of paragraph (d)(3)(iii) of this section, then the employee's normal work schedule and number of hours worked per week are relevant factors in evaluating the service aspect of the employee's relationship with the employer. As an employee's normal work schedule or actual number of hours worked approaches 40 hours per week, it is more likely that the service aspect of the employee's relationship with the employer is predominant. The determination of an employee's normal work schedule and actual number of hours worked is not affected by the fact that some of the services performed by the employee may have an educational, instructional, or training aspect.

(B) *Professional employee.* (*1*) If an employee has the status of a professional employee, then that suggests the service aspect of the employee's relationship with the employer is predominant. A professional employee is an employee—

(*i*) Whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by

a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education, from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes;

(*ii*) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(*iii*) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(2) *Licensed, professional employee.* If an employee is a licensed, professional employee, then that further suggests the service aspect of the employee's relationship with the employer is predominant. An employee is a licensed, professional employee if the employee is required to be licensed under state or local law to work in the field in which the employee performs services and the employee is a professional employee within the meaning of paragraph (d)(3)(v)(B)(1) of this section.

(C) *Employment Benefits.* Whether an employee is eligible to receive one or more employment benefits is a relevant factor in evaluating the service aspect of an employee's relationship with the employer. For example, eligibility to receive vacation, paid holiday, and paid sick leave benefits; eligibility to participate in a retirement plan or arrangement described in sections 401(a), 403(b), or 457(a); or eligibility to receive employment benefits such as reduced tuition (other than qualified tuition reduction under section 117(d(5) provided to a teaching or research assistant who is a graduate student), or bene-

fits under sections 79 (life insurance), 127 (qualified educational assistance), 129 (dependent care assistance programs), or 137 (adoption assistance) suggest that the service aspect of an employee's relationship with the employer is predominant. Eligibility to receive health insurance employment benefits is not considered in determining whether the service aspect of an employee's relationship with the employer is predominant. The weight to be given the fact that an employee is eligible for a particular employment benefit may vary depending on the type of benefit. For example, eligibility to participate in a retirement plan is generally more significant than eligibility to receive a dependent care employment benefit. Additional wight is given to the fact that an employee is eligible to receive an employment benefit if the benefit is generally provided by the employer to employees in positions generally held by non-students. Less weight is given to the fact that an employee is eligible to receive an employment benefit if eligibility for the benefit is mandated by state or local law.

(e) *Examples.* The following examples illustrate the principles of paragraphs (a) through (d) of this section:

Example 1. (i) Employee C is employed by State University T to provide services as a clerk in T's administrative offices, and is enrolled and regularly attending classes at T in pursuit of a B.S. degree in biology. C has a course workload during the academic term which constitutes a full-time course workload at T. C is considered a part-time employee by T during the academic term, and C's normal work schedule is 20 hours per week, but occasionally due to work demands unforeseen at the start of the academic term C works 40 hours or

more during a week. C is compensated by hourly wages, and receives no other compensation or employment benefits.

(ii) In this *example*, C is employed by T, a school, college, or university within the meaning of paragraph (c) of this section. C is enrolled and regularly attending classes at T in pursuit of a course of study. C is not a full-time employee based on T's standards, and C's normal work schedule does not cause C to have the status of a full-time employee, even though C may occasionally work 40 hours or more during a week due to unforeseen work demands. C's part-time employment relative to C's full-time course workload indicates that the educational aspect of C's relationship with T is predominant. Additional facts supporting this conclusion are that C is not a professional employee, and C does not receive any employment benefits. Thus, C's services are incident to and for the purpose of pursuing a course of study. Accordingly, C's services are excepted from employment under section 3121(b)(10).

Example 2. (i) Employee D is employed in the accounting department of University U, and is enrolled and regularly attending classes at U in pursuit of an M.B.A. degree. D has a course workload which constitutes a half-time course workload at U. D is considered a full-time employee by U under U's standards and practices.

(ii) In this *example*, D is employed by U, a school, college, or university within the meaning of paragraph (c) of this section. In addition, D is enrolled and regularly attending classes at U in pursuit of a course of study. However, because D is considered a full-time employee by U under its standards and practices, D's ser-

vices are not incident to and for the purpose of pursuing a course of study. Accordingly, D's services are not excepted from employment under section 3121(b)(10).

Example 3. (i) The facts are the same as in Example 2, except that D is not considered a full-time employee by U, and D's normal work schedule is 32 hours per week. In addition, D's work is repetitive in nature and does not require the consistent exercise of discretion and judgment, and is not predominantly intellectual and varied in character. However, D receives vacation, sick leave, and paid holiday employment benefits, and D is eligible to participate in a retirement plan maintained by U described in section 401(a).

(ii) In this *example*, D's half-time course workload relative to D's hours worked and eligibility for employment benefits indicates that the service aspect of D's relationship with U is predominant, and thus D's services are not incident to and for the purpose of pursuing a course of study. Accordingly, D's services are not excepted from employment under section 3121(b)(10).

Example 4. (i) Employee E is employed by University V to provide patient care services at a teaching hospital that is an unincorporated division of V. These services are performed as part of a medical residency program in a medical specialty sponsored by V. The residency program in which E participates is accredited by the Accreditation Counsel for Graduate Medical Education. Upon completion of the program, E will receive a certificate of completion, and be eligible to sit for an examination required to be certified by a recognized organization in the medical specialty. E's normal work schedule, which includes services having an educational,

instructional, or training aspect, is 40 hours or more per week.

(ii) In this *example*, E is employed by V, a school, college, or university within the meaning of paragraph (c) of this section. However, E's normal work schedule calls for E to perform services 40 or more hours per week. E is therefore a full-time employee, and the fact that some of E's services have an educational, instructional, or training aspect does not affect that conclusion. Thus, E's services are not incident to and for the purpose of pursuing a course of study. Accordingly, E's services are not excepted from employment under section 3121(b)(10) and there is no need to consider other relevant factors, such as whether E is a professional employee or whether E is eligible for employment benefits.

Example 5. (i) Employee F is employed in the facilities management department of University W. F has a B.S. degree in engineering, and is completing the work experience required to sit for an examination to become a professional engineer eligible for licensure under state or local law. F is not attending classes at W.

(ii) In this *example*, F is employed by W, a school, college, or university within the meaning of paragraph (c) of this section. However, F is not enrolled and regularly attending classes at W in pursuit of a course of study. F's work experience required to sit for the examination is not a course of study for purposes of paragraph (d)(2) of this section. Accordingly, F's services are not excepted from employment under section 3121(b)(10).

Example 6. (i) Employee G is employed by Employer X as an apprentice in a skilled trade. X is a subcon-

tractor providing services in the field in which G wishes to specialize. G is pursuing a certificate in the skilled trade from Community College C. G is performing services for X pursuant to an internship program sponsored by C under which its students gain experience, and receive credit toward a certificate in the trade.

(ii) In this *example*, G is employed by X. X is not a school, college or university within the meaning of paragraph (c) of this section. Thus, the exception from employment under section 3121(b)(10) is not available with respect to G's services for X.

Example 7. (i) Employee H is employed by a cosmetology school Y at which H is enrolled and regularly attending classes in pursuit of a certificate of completion. Y's primary function is to carry on educational activities to prepare its students to work in the field of cosmetology. Prior to issuing a certificate, Y requires that its students gain experience in cosmetology services by performing services for the general public on Y's premises. H is scheduled to work and in fact works significantly less than 30 hours per week. H's work does not require knowledge of an advanced type in a field of science or learning, nor is it predominantly intellectual and varied in character. H receives remuneration in the form of hourly compensation from Y for providing cosmetology services to clients of Y, and does not receive any other compensation and is not eligible for employment benefits provided by Y.

(ii) In this *example*, H is employed by Y, a school, college or university within the meaning of paragraph (c) of this section, and is enrolled and regularly attending classes at Y in pursuit of a course of study. Factors indicating the educational aspect of H's relationship with

Y is predominant are that H's hours worked are significantly less than 30 per week, H is not a professional employee, and H is not eligible for employment benefits. Based on the relevant facts and circumstances, the educational aspect of H's relationship with Y is predominant. Thus, H's services are incident to and for the purpose of pursuing a course of study. Accordingly, H's services are excepted from employment under section 3121(b)(10).

Example 8. (i) Employee J is a graduate teaching assistant at University Z. J is enrolled and regularly attending classes at Z in pursuit of a graduate degree. J has a course workload which constitutes a full-time course workload at Z. J's normal work schedule is 20 hours per week, but occasionally due to work demands unforeseen at the start of the academic term J works more than 40 hours during a week. J's duties include grading quizzes and exams pursuant to guidelines set forth by the professor, providing class and laboratory instruction pursuant to a lesson plan developed by the professor, and preparing laboratory equipment for demonstrations. J receives a cash stipend and employment benefits in the form of eligibility to make elective employee contributions to an arrangement described in section 403(b). In addition, J receives qualified tuition reduction benefits within the meaning of section 117(d)(5) with respect to the tuition charged for the credits earned for being a graduate teaching assistant.

(ii) In this *example*, J is employed by Z, a school, college, or university within the meaning of paragraph (c) of this section, and is enrolled and regularly attending classes at Z in pursuit of a course of study. J's full-time course workload relative to J's normal work

schedule of 20 hours per week indicates that the educational aspect of J's relationship with Z is predominant. In addition, J is not a professional employee because J's work does not require the consistent exercise of discretion and judgment in its performance. On the other hand, the fact that J receives employment benefits in the form of eligibility to make elective employee contributions to an arrangement described in section 403(b) indicates that the employment aspect of J's relationship with Z is predominant. Balancing the relevant facts and circumstances, the educational aspect of J's relationship with Z is predominant. Thus, J's services are incident to and for the purpose of pursuing a course of study. Accordingly, J services are excepted from employment under section 3121(b)(10).

(f) *Effective date.* Paragraphs (a), (b), (c), (d) and (e) of this section apply to services performed on or after April 1, 2005.

* * * * *

REPLY BRIEF

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IN THE

Supreme Court of the United States

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH; MAYO CLINIC; AND REGENTS OF THE UNIVERSITY OF MINNESOTA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate

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REPLY BRIEF FOR PETITIONERS

The government's rigid, categorical position makes this a straightforward case: Because the full-time employee regulation excludes *all* medical residents from the definition of "student" in FICA's Student Exemption, if *any* medical resident is unambiguously a "student," then the regulation is invalid.

The residents enrolled in petitioners' medical residency programs unambiguously are students. Those residents are enrolled in formal, accredited educational programs that require them to complete a rigorous, structured course of study as a prerequisite to their becoming board-certified physicians. Pet. Br. 4-10, 23-33. While enrolled in petitioners' programs, residents follow a comprehensive, didactic core curriculum, attend hundreds of conferences and lectures, conduct laboratory research, take written examinations, receive grades for their academic performance, and engage in intensive, hands-on patient-care training under the close supervision of petitioners' faculty members. *Id.* at 7-9, 23-24.

The student status of petitioners' residents is not diminished by the clinical setting in which they obtain their most critical knowledge and skills. Pet. Br. 23-24. That clinical instruction is vital to a resident's education. A resident cannot learn to "intubat[e] newborn infants in crisis," "stitch[ ] wounds," "execut[e] lumbar punctures," or "us[e] defibrillators" (U.S. Br. 5) by sitting in a classroom. The same is true of many other skills and procedures residents must master in order to complete their residency programs and obtain board certification. As with third- and fourth-year medical students, a resident's "performance in [clinical work] is no less . . . 'aca-

demic' . . . because it involves" developing "skills and techniques in actual conditions of practice, rather than [providing] . . . written answers [to] an essay question." *Bd. of Curators v. Horowitz*, 435 U.S. 78, 95 (1978) (Powell, J., concurring).

The Treasury Department's attempt to exclude petitioners' medical residents from FICA's Student Exemption rests on an arbitrary and irrational distinction between classroom learning and clinical instruction. Because that distinction finds no support in the unambiguous language of the Student Exemption, the full-time employee regulation is invalid.

ARGUMENT

I. THE STATUTORY TERM "STUDENT" PLAINLY ENCOMPASSES PETITIONERS' MEDICAL RESIDENTS.

The government contends that the full-time employee regulation validly confines the Student Exemption to individuals who are predominantly students. *See, e.g.*, U.S. Br. 21, 35-36, 37-38. That argument grossly understates the force and effect of the full-time employee regulation. While that regulation appropriately excludes *some* nonstudents from the scope of the Student Exemption, its categorical, overbroad exclusion of *all* individuals who work more than forty hours per week also reaches individuals who unambiguously are students—including petitioners' medical residents. The government's argument to the contrary ignores the record in this case, as well as the findings of other courts that have examined the nature of graduate medical education programs and concluded that medical residents are plainly students. *See, e.g., United States v. Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 1018 (D. Minn. 2003) ("*Mayo I*").

Petitioners' residents fall squarely within the unambiguous language of the Student Exemption. They are enrolled in "a formal and structured educational program" (Pet. App. 38a n.8) that must meet the rigorous curricula and institutional requirements established by the Accreditation Council for Graduate Medical Education ("ACGME"). *United States v. Mt. Sinai Med. Ctr. of Fla., Inc.*, 2008 WL 2940669, at *7 (S.D. Fla. July 28, 2008). "ACGME accreditation carries with it a host of requirements that are intended to ensure that residents are continually engaged in activities that further their education." AAMC Br. 13; *see also* Univ. of Ala. Br. 19-22.

For example, the ACGME requires residents to attend conferences and lectures, conduct laboratory research, and engage in other scholarly activities. *Mt. Sinai*, 2008 WL 2940669, at *8. Petitioners must provide their residents with a "comprehensive ... didactic core curriculum and written syllabus." *Mayo I*, 282 F. Supp. 2d at 1004. For each course they take, petitioners' residents are "assigned textbooks and journal articles relevant to the subject matter." *Id.* The residents must regularly attend core curriculum conferences, morbidity and mortality conferences, journal clubs, and lectures. *See* Pet. App. 41a n.10, 63a; *see also Mayo I*, 282 F. Supp. 2d at 1004, 1016 (residents may attend as many as "900 lectures and conferences" during their residency programs). Residents take written examinations and are graded on their academic performance. *See* Pet. App. 63a-64a; *Mayo I*, 282 F. Supp. 2d at 1004; J.A. 213a-14a.

To ensure that they are "fully trained to independently practice medicine" (*Mt. Sinai*, 2008 WL 2940669, at *3), residents not only must study in a traditional classroom but also must learn "how to

safely perform medical procedures on patients." Pet. App. 62a. Residents' "principal classroom" is therefore "the clinical setting," where they "learn by caring for patients in a medical specialty under the supervision of a [] faculty member." *Id.* at 62a-63a. That structured teaching environment includes "didactic sessions" in which a faculty member moves residents from patient to patient to "draw out and explain the salient educational points of each patient's condition." *Mayo I*, 282 F. Supp. 2d at 1003. By spending an average of forty or more hours per week caring for patients, petitioners' residents learn "by doing a medical task under the direct and personal guidance" of a faculty member. *Id.* at 1003, 1018. This method of education is "necessary" because "[a] future physician cannot adequately develop skills if not permitted to perform actual procedures on real patients." *Minnesota v. Chater*, 1997 WL 33352908, at *7 (D. Minn. May 21, 1997).

The ACGME accreditation requirements make clear that the clinical focus of residents' training is undertaken solely for objectively educational purposes. For example, the ACGME requires institutions that sponsor residency programs to "prioriti[ize] . . . education over service" and prohibits them from using residents for work that lacks educational value. *Mt. Sinai*, 2008 WL 2940669, at *10. In fact, the inefficiencies of providing patient care in a teaching setting make sponsoring a medical residency program a costly endeavor. *See id.* at *9. "Congress," in particular, "was concerned that teaching hospitals would incur greater costs in treating patients than would non-teaching hospitals," and, "[t]o remedy this inequity, . . . established an indirect medical education (IME) adjustment to increase Medicare payments to acute care teaching hospitals." *Rhode Is-*

land Hosp. v. Leavitt, 548 F.3d 29, 32 (1st Cir. 2008); *see also* Univ. of Tex. Br. 35-38.[1]

Nothing about the clinical setting in which residents develop their skills and knowledge undermines the educational purpose of their patient-care services. "Because participants [in graduate medical education programs] learn both by treating patients and by observing other physicians do so, [those] programs take place in a patient care unit (most often in a teaching hospital), rather than in a classroom." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 507 (1994). Indeed, the Treasury Department itself has recognized that student status does not require instruction in a classroom setting. Its regulations construing the Student Exemption explicitly provide that "[t]raditional classroom activities are *not* the sole means of satisfying th[e] requirement" that a student be "enrolled and regularly attending classes." Treas. Reg. § 31.3121(b)(10)-2(d)(1) (emphasis added). "For example, research activities under the supervision of a faculty advisor necessary to complete the requirements for a Ph.D. degree may constitute classes" within the meaning of the Student Exemption. *Id.*; *see also* IRS Gen. Couns. Mem.

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[1] *Amicus* Committee of Interns and Residents cites studies indicating that residents provide "critical patient care services" and that teaching hospitals "would incur substantial costs if the resident physicians had to be replaced with other employees." CIR Br. 4. Petitioners do not dispute that, in order to acquire medical skills, residents provide patient-care services or that, in the absence of residents, teaching hospitals would have to hire other employees to provide those services. Employees need not provide valueless services, however, to qualify for the Student Exemption. Like medical residents, they instead must provide those services "for the purpose of pursuing a course of study." Treas. Reg. § 31.3121(b)(10)-2(d)(3)(i).

37252, 1977 WL 46189 (Sept. 14, 1977) (the Student Exemption should not be "so narrowly construed as to limit the exception to one who actually attends a classroom lecture"). Because residents could not obtain all the skills and knowledge they need to become fully trained physicians in the classroom, the clinical setting in which they receive instruction is essential to their medical education.

II. The Government's Arguments In Defense Of The Full-Time Employee Regulation Are Unavailing.

None of the government's arguments in defense of the full time employee regulation's categorical exclusion of medical residents from the Student Exemption withstands scrutiny.

A. The government makes several strained attempts to locate support for the full-time employee regulation in the plain language of the Student Exemption. There is nothing in that unambiguous language, however, that supports the regulation's arbitrary and irrational treatment of full-time employees.

According to the government, "the [statutory] phrase 'service performed by a student' supports the Treasury's longstanding view that the exemption is limited to individuals who are predominantly students and only incidentally employees." U.S. Br. 21; *see also id.* at 35-36 (arguing, on the same ground, that the full-time employee regulation is reasonable and consistent with the statutory text). But the government's statutory argument attacks a strawman. As the government recognizes elsewhere in its brief (at 35), petitioners are not challenging the requirement that the "educational aspect of the relationship between the employer and the employee, as com-

pared to the service aspect of the relationship, be predominant in order for the employee's services" to qualify for the Student Exemption. Treas. Reg. § 31.3121(b)(10)-2(d)(3)(ii). That unchallenged predominance requirement means that, contrary to the government's dire predictions, "[u]niversity professors, admissions officers, and bookkeepers" could not "exempt themselves from FICA by enrolling in evening classes." U.S. Br. 36. A professor enrolled in night school is not "predominantl[y]" a student.

What petitioners *are* challenging is the Department's effort to categorically exclude all full-time employees from the scope of the Student Exemption, which rests on the implicit assumption that the educational aspect of a full-time employee's relationship with his school can *never* predominate over the service aspect. That assumption is insupportable. The number of hours a person is employed reveals nothing about whether that person is "predominantly" a student. Rather, the relevant inquiry is *what* the employee does and *why*—not *how long* the employee does it. On the government's view, a person can be predominantly a student when he spends 35 hours per week learning in a clinical setting, but is no longer predominantly a student when he devotes 45 hours per week to clinical learning. If anything, the additional 10 hours of clinical education would make one more "predominantly" a student.

In this regard, the government presents the same false dichotomy as *amicus* Committee of Interns and Residents. *See, e.g.*, CIR Br. 2 (arguing that "multiple regulatory regimes . . . overwhelmingly treat resident physicians as employees rather than students"). The question is not whether medical residents are employees *or* students. The language of the Student Exemption itself makes clear

that the statute applies to "service performed in the *employ* of a school, college, or university." 26 U.S.C. § 3121(b)(10) (emphasis added). The question is whether the nature of the services that medical residents provide to the educational institutions that employ them makes them "students" within the meaning of the Student Exemption. While the answer to that question is plainly "yes," it does not mean that medical residents are not employees under other federal and state regulatory regimes (or within the meaning of the Student Exemption itself).

The government's other textual argument is equally unpersuasive. The government argues that the statutory phrase "service performed by a student" "supports the full time employee rule's underlying premise that an individual cannot qualify as a 'student' based on the fact that his employment has educational or training value." U.S. Br. 22. But there is nothing in the statutory language that states that student status must be determined without regard to the nature of an employee's service. What the statute does say is that FICA taxation is inapplicable to "service performed in the employ of a school, college, or university, . . . if such service is performed by a student." 26 U.S.C. § 3121(b)(10). The term "student" unambiguously encompasses individuals who are engaged in "study." *Oxford Universal Dictionary* 2049 (3d ed. 1955). Thus, "service . . . performed" in a teaching hospital by a medical resident qualifies for the Student Exemption because residents perform procedures for an educational purpose and pursuant to a prescribed academic curriculum that guides their ongoing study of medicine. In contrast, "service . . . performed" by an attending physician does not qualify for the Exemption because

board-certified, attending physicians are no longer engaged in the study of medicine.

The government asserts that the term "student" can reasonably be read to encompass only persons engaged in "formal, academic instruction." U.S. Br. 22. But even if that artificially narrow definition of "student" were reasonable, the full-time employee regulation would still be invalid because that definition unambiguously encompasses petitioners' medical residents. Those residents are enrolled in petitioners' formal, structured, ACGME-accredited graduate medical education programs and must complete those rigorous, multi-year academic courses—which include a combination of classroom instruction, academic research, and clinical training—in order to become eligible for board certification in a medical specialty.

Petitioners' medical residents are therefore far different from law clerks and plumbing and electrician apprentices (U.S. Br. 28, 33) because, at least as a general matter, none of those individuals are enrolled and attending classes in formal, accredited, structured educational programs. Indeed, the government concedes as much later in its brief, where it acknowledges that "most architects, engineers, and surveyors who are serving internships required for licensure would not qualify for the student exemption because their internships are generally served in the employ of firms or individuals rather than schools, colleges, or universities." *Id.* at 36. According to the government, however, "it is not evident why Congress would have treated those individuals differently for FICA tax purposes than medical residents." *Id.* But Congress could have reasonably concluded that, in determining eligibility for the Student Exemption, it is appropriate to draw a line between

individuals who are enrolled in school and regularly attending classes, and those individuals who are engaged in learning outside a formal, structured academic setting. Extending the Student Exemption beyond the setting of formal academic institutions would have vastly expanded its scope and significantly complicated the Treasury Department's administration of the Exemption.

B. The government's invocation of "statutory context" similarly provides no support for the full-time employee regulation. U.S. Br. 23-24.

The government abstractly warns against broad constructions of tax exemptions. U.S. Br. 24. But interpreting the Student Exemption as unambiguously written does not constitute a broad—let alone an improper—construction of the Exemption. As explained above, the statutory requirement that the student be "enrolled and regularly attending classes at . . . [a] school, college, or university" (26 U.S.C. § 3121(b)(10))—together with the unchallenged regulatory requirement that the "educational aspect of the relationship between the employer and the employee . . . be predominant" (Treas. Reg. § 31.3121(b)(10)-2(d)(3)(i))—imposes a significant constraint on the Exemption's reach that generally excludes interns, apprentices, and full-time university employees enrolled in evening classes.

The government also invokes the general principle that tax exemptions must be "clear" and may not "'rest upon implication.'" U.S. Br. 24. Those background rules of construction add nothing here because the Student Exemption *is* clear: It applies to all "service performed in the employ of a school, college, or university . . . if such service is performed by a student who is enrolled and regularly attending

classes at such school, college, or university." 26 U.S.C. § 3121(b)(10). Even under the government's narrow definition of "student," petitioners' medical residents qualify for the Exemption because they are engaged in "formal, academic instruction" at petitioners' ACGME-accredited educational institutions. U.S. Br. 22.

C. The government's invocation of legislative history (U.S. Br. 24-27) is unwarranted because legislative history has no role where the "statutory text . . . is clear." *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994). In any event, the Student Exemption's legislative history does not support the full-time employee regulation's arbitrary and irrational construction of the plain statutory language.

The snippets of legislative history invoked by the government (at 24-25) give an incomplete picture of the two distinct Student Exemption provisions enacted in 1939. One of those provisions provided an exemption for students employed by tax-exempt schools regardless of their earnings (Pub. L. No. 76-379, § 1426(b)(10)(A)(iii), 53 Stat. 1360, 1384-85 (1939)); the other provided an exemption for students employed by non-tax-exempt schools if the student earned less than $45 per quarter. *Id.* § 1426(b)(10)(E), 53 Stat. at 1385. Thus, it is not the case that, as the government asserts, both of the originally enacted exemptions were confined to "'inconsequential tax payments'" or to "'part-time or intermittent'" employment where the "'total amount of earnings is only nominal.'" U.S. Br. 24-25 (quoting H.R. Rep. No. 728, 76th Cong., 1st Sess. 17 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 19 (1939)). Neither of the statutory exemptions said anything about hours of employment, and, as Congress recognized in the very committee reports cited by the government,

the nominal-earnings requirement applied only to the exemption for employees of non-tax-exempt schools. *See* Pet. Br. 48 (quoting reports). Had Congress wanted to impose an across-the-board nominal-earnings requirement or an hours-based limitation, it would have done so in the text of the statute. Indeed, the Treasury Department itself did not understand Congress to have limited the Student Exemption to "inconsequential tax payments" from "nominal" earnings; it contemporaneously declared by regulation that "the amount of remuneration for services performed by [an] employee" of a tax-exempt school is "*immaterial*" to eligibility for the Exemption. Treas. Reg. § 402.217(d), 5 Fed. Reg. 785 (Feb. 27, 1940) (emphasis added).

Moreover, in 1950, Congress eliminated the nominal-earnings requirement altogether by combining the two Student Exemption provisions into a single provision that does not include *any* limitation based on the amount of compensation. Thus, whatever Congress may have intended regarding the scope of the originally enacted Exemptions, it made clear in 1950 that eligibility for the current Exemption is *not* limited to students who earn a nominal amount of compensation. *See* Pet. Br. 38-39.[2]

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[2] In support of its invocation of legislative history, the government cites a revenue ruling in which the Treasury Department relied on the 1939 legislative history to interpret the Student Nurse Exemption as "applying only when a nurse's employment is substantially less than full-time." U.S. Br. 27 (quoting Rev. Rul. 85-74, 1985-1 C.B. 331, 332). That argument is flawed in numerous respects. First, as explained above, the excerpts of legislative history cited by the government —even if relevant to the scope of the Student *Nurse* Exemption—lend no support for the Treasury Department's reading of the general Student Exemption. Second, the only authority the government

D. The government next argues that interpreting the Student Exemption to encompass petitioners' medical residents would undermine "FICA's goal" of "collect[ing] contributions from employees throughout their working lives." U.S. Br. 27. But medical residents have not begun their "working lives" because they "are not deemed fully trained to independently practice medicine." *Mt. Sinai*, 2008 WL 2940669, at *3. "[T]o practice medicine in a given field, . . . an individual holding an M.D. degree typically must (1) complete an accredited residency training program . . . and (2) become certified by a specialty board." *Mayo I*, 282 F. Supp. 2d at 1007.

Petitioners' interpretation of the Student Exemption furthers FICA's purposes by requiring medical-school graduates to begin contributing to FICA only when they have truly commenced their working lives as independently practicing physicians. Moreover,

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cites to support the "reasonableness" of the Department's revenue ruling is the Sixth Circuit's decision in *Johnson City Medical Center v. United States*, 999 F.2d 973, 977 (6th Cir. 1993). U.S. Br. 27. But the application of the Student Nurse Exemption to full-time employees was not at issue in *Johnson City* because the student nurses in that case "worked no more than 40 hours per *two week* pay period." *Johnson City*, 999 F.2d at 974 (emphasis added). In any event, *Johnson City* afforded *Chevron* deference to the IRS's revenue ruling, and the Sixth Circuit has since recognized that, in light of this Court's later decisions, it erred in doing so. *See Aeroquip-Vickers, Inc. v. Comm'r*, 347 F.3d 173, 180-81 (6th Cir. 2003). Finally, even setting aside whether *Chevron* deference may *ever* be afforded to a revenue ruling, it could be proper only when the statute at issue is ambiguous. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Whatever may be said of the Student Nurse Exemption, the Student Exemption at issue here is unambiguous.

the government's concerns about "promot[ing] the fiscal soundness of . . . Social Security and Medicare" (at 27) are misplaced because medical residents who are covered by the Student Exemption do not accrue Social Security and Medicare benefits. *See* 20 C.F.R. § 404.1028(c). Thus, giving force to the full and unambiguous scope of the Student Exemption will not impose any additional financial burdens on these federal benefit programs.

E. The government is equally wrong when it contends that the full-time employee regulation is consistent with the Treasury Department's longstanding interpretation of the Student Exemption. U.S. Br. 30-34. Before the 2005 adoption of that regulation, the Department had never suggested that all full-time employees are categorically ineligible for the Exemption.

In 1951, the Treasury Department adopted regulations stating that the Exemption is limited to those individuals whose services are performed "incident to and for the purpose of pursuing a course of study" (16 Fed. Reg. 12,453, 12,474 (Dec. 12, 1951))—a requirement that remains in the regulations to this day. Treas. Reg. § 31.3121(b)(10)-2(d)(3). The government acknowledges that, "[h]istorically," the Treasury Department "determined whether an individual's student activities predominated by conducting a case-specific examination of all relevant facts and circumstances." U.S. Br. 31. *That* is the Treasury's longstanding interpretation of the Student Exemption, and that case-by-case inquiry cannot be reconciled with the categorical approach embodied in the full-time employee regulation.

Under that case-by-case framework, the government initially reached inconsistent conclusions as to

whether medical residents qualify for the Student Exemption. *Compare* SSR 78-3, [1978-1979 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 15,641, at 2,100, 1978 WL 14050 (medical residents are ineligible for the Exemption), *with* IRS CCA 200212029 (Jan. 24, 2002) ("whether medical residents are students depends upon the facts and circumstances in each case"). But after four courts of appeals concluded that the Student Exemption unambiguously encompasses medical residents who otherwise satisfy the Exemption's statutory criteria (*see* Pet. Br. 32), the Department formally "accept[ed] the position . . . that medical residents are excepted from FICA taxes . . . for tax periods" preceding the enactment of the full-time employee regulation. IRS, Press Release, IRS to Honor Medical Resident FICA Refund Claims (Mar. 2, 2010). The categorical exclusion of *all* medical residents—and other full-time employees—from the scope of the Student Exemption is therefore a sharp departure from the Department's prior interpretations of the Exemption.[3]

F. The government also maintains that FICA's historical development indicates that residents are not covered by the Student Exemption. *See* U.S. Br.

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[3] Nor can the government derive support for the Department's rigid, hours-based approach by citing pre-2005 revenue rulings and advisory memoranda in which the Treasury "indicated that the number of hours worked is an important factor in determining whether an employee's services are 'incident to' his activities as a student and that full-time work is generally inconsistent with student status." U.S. Br. 31. The number of hours worked can be a relevant factor in determining, on a case-by-case basis, whether an employee is a student. But, contrary to the government's position, where the services performed during the hours worked are educational in nature, long hours make the employee *more* of a student, not less of one.

39-42. The government's argument focuses on the Intern Exemption, which was enacted in 1939 and repealed in 1965. That exemption excluded from the definition of "employment" "service performed as an interne in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to State law." Pub. L. No. 76-379, § 1426(b)(13), 53 Stat. 1360, 1385 (1939). According to the government, "[i]f residents were unambiguously 'students,' interns likewise would have been 'students,' and Congress would have had little need to enact a separate exemption" for interns. U.S. Br. 40.

The government's argument ignores the differences between the Student and Intern Exemptions. The Student Exemption, as originally enacted and as in force today, applies only to individuals who are enrolled and regularly attending classes at a school, college, or university. *See* § 1426(b)(10)(A)(ii), (E), 53 Stat. at 1384-85. The Intern Exemption, in contrast, did not include an attendance-and-enrollment requirement; it instead applied to interns "in the employ of a hospital." *Id.* § 1426(b)(13). Thus, Congress would have had "little need" for the Intern Exemption only if every "hospital" were a "school, college, or university"—which the government rightly does not suggest to be the case.

Nor does the repeal of the Intern Exemption in 1965 "support the conclusion that medical residents are not encompassed by the student exemption." U.S. Br. 41. The government reasons that "[r]epealing the intern exemption would not have accomplished" Congress's goal of providing "needed disability and survivorship benefits" to doctors and their families "if most (or even many) interns, as well as residents, would have been excluded from cover-

age by the student exemption." *Id.* But the government offers no support for its suggestion that "most" or "many" interns were employed by a "school, college, or university" and thus eligible for the Student Exemption.

In any event, Congress did not act with the sweep that the government suggests. The 1965 amendments to FICA were not intended to subject all interns to FICA taxation. As stated in the House Report accompanying the repeal of the Intern Exemption, the elimination of that exemption imposed FICA taxes on interns "unless their services are excluded under provisions other than [the Intern Exemption]." H.R. Rep. No. 213, 89th Cong., 1st Sess. 215 (1965), *reprinted in* 1965-2 C.B. 733, 747. The government attempts to blunt the force of the House Report by observing that the only provision the committee reports mentioned by name was an exemption for services performed for tax-exempt organizations. U.S. Br. 41 n.7. But, notably, the House Report speaks of "exclu[sions]" under other "*provisions*" of law and thus plainly contemplated that an intern might have qualified for an exemption other than the one explicitly identified in the Report.[4]

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[4] Moreover, the history of the Intern and Student Exemptions demonstrates that Congress consistently sought to exempt from FICA taxation doctors who had not completed their medical educations, while assessing FICA taxes upon those who had begun their working lives. Although the term "intern" was initially limited to individuals "seeking . . . hospital training," by the 1960s, the scope of the term had expanded to encompass at least some doctors "entitled to practice medicine." *St. Luke's Hosp. Ass'n v. United States*, 333 F.2d 157, 161 (6th Cir. 1964). The repeal of the Intern Exemption therefore furthered Congress's objectives by extending FICA taxation to those interns

G. Finally, the government contends that this Court's decision in *National Muffler Dealers Association v. United States*, 440 U.S. 472 (1979), has been superseded by *Chevron* and thus the factors it identifies for determining the validity of a tax regulation are "largely irrelevant" here. *See* U.S. Br. 50-55. But this Court has repeatedly considered the *National Muffler* factors in post-*Chevron* cases involving the reasonableness of tax regulations. *See, e.g., Boeing Co. v. United States*, 537 U.S. 437, 448 (2003); *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 560-61 (1991). In any event, as the government concedes, several of the *National Muffler* factors bear directly upon the *Chevron* analysis. U.S. Br. 53. Whether the full-time employee regulation is analyzed under *National Muffler* or under *Chevron*, the ultimate question remains whether the regulation is a reasonable interpretation of the Student Exemption. As discussed above, the full-time employee regulation is patently unreasonable because its arbitrary restriction on the scope of the Exemption is inconsistent with the text, history, and purpose of the statute.

The government's specific objections to petitioners' application of the *National Muffler* factors lack merit. For example, the government objects to petitioners' statement that the full-time employee regulation was promulgated only recently, and contends that antiquity is not a condition of a regulation's validity. U.S. Br. 52. But the full-time employee regulation is "undermined" not simply by "the recency of

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who had begun their working lives as doctors, and permitting those interns who were still completing their medical educations and who were employed by a "school, college, or university" to qualify for the Student Exemption.

its adoption" (*id.*), but by the fact that it conflicts with the interpretation of those "presumed to have been aware of congressional intent." *Nat'l Muffler*, 440 U.S. at 477. Indeed, the Treasury Department regulations promulgated in 1940—a year after the Student Exemption's enactment—included no restrictions based on the number of hours worked. Treas. Reg. § 31.3121(b)(10)-2(c) (2004).

Similarly, while an agency is permitted to change positions in interpreting a statute (U.S. Br. 53), it cannot further its policy preferences by adopting an arbitrary position that lacks grounding in the statutory text. That is precisely what happened here. Confronted with a growing tide of judicial decisions holding that medical residents are eligible for the Student Exemption (*see, e.g.*, *Mayo I*, 282 F. Supp. 2d at 1018)—and an "avalanche" of pending litigation by institutions seeking refunds under the Exemption (Pet. App. 3a)—the Treasury Department could have asked Congress to amend the Exemption to exclude medical residents. Instead, the Department abandoned its longstanding case-by-case approach for determining eligibility for the Student Exemption and, by agency fiat, replaced it with a categorical standard that excludes full-time employees regardless of the educational nature of their employment. That inflexible and irrational approach has never been endorsed by Congress, has no support in the language of the Student Exemption, and should be rejected by this Court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH; MAYO CLINIC; AND REGENTS OF THE UNIVERSITY OF MINNESOTA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF FOR THE AMERICAN HOSPITAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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CASES

Abbott Labs. v. Portland Retail Druggists Ass'n, Inc.,
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Auer v. Robbins,
519 U.S. 452 (1997) 10

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 10

Ctr. for Family Med. v. United States,
No. 05-4049, 2008 WL 3245460
(D.S.D. Aug. 6, 2008) 5, 6, 8

Mayo Found. for Med. Educ. & Research v. United States,
503 F. Supp. 2d 1164 (D. Minn. 2007),
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Mayo Found. for Med. Educ. & Research v. United States,
568 F.3d 675 (8th Cir. 2009) 2, 10

Minnesota v. Chater,
No. 4-96-756, 1997 WL 33352908
(D. Minn. May 21, 1997), *aff'd sub nom. Minnesota v. Apfel*, 151 F.3d 742
(8th Cir. 1998) 5, 6

TABLE OF AUTHORITIES
(continued)

Page(s)

Regents of the Univ. of Minnesota v. United States,
No. 06-5084, 2008 WL 906799 (D. Minn. Apr. 1, 2008), *rev'd sub nom. Mayo Found. for Med. Educ. & Research v. United States*, 568 F.3d 675 (8th Cir. 2009) 5, 6, 7, 8

United States v. Detroit Med. Ctr.,
557 F.3d 412 (6th Cir. 2009) 4

United States v. Mayo Found. for Med. Educ. & Research,
282 F. Supp. 2d 997 (D. Minn. 2003) 5, 6, 7, 8

United States v. Mem'l Sloan-Kettering Cancer Ctr.,
563 F.3d 19 (2d Cir. 2009) 4

United States v. Mount Sinai Med. Ctr. of Fla., Inc.,
486 F.3d 1248 (11th Cir. 2007) 4

United States v. Mount Sinai Med. Ctr. of Fla.,
No. 02-22715, 2008 WL 2940669 (S.D. Fla. July 28, 2008).....5, 6, 7, 8

Univ. of Chi. Hosps. v. United States,
545 F.3d 564 (7th Cir. 2008) 4

STATUTES AND REGULATORY AUTHORITIES

15 U.S.C. § 37b 3, 10, 22

26 U.S.C. § 3121(b)(10) 1, 3

26 C.F.R. § 31.3121(b)(10)-2(c) (pre-Apr. 1, 2005) 4

TABLE OF AUTHORITIES
(continued)

Page(s)

26 C.F.R. § 31.3121(b)(10) 2(d) (post-Apr.1, (2005) 8

26 C.F.R. § 31.3121(b)(10)-2(e) (post-Apr.1, (2005) 9

IR-2010-25 (Mar. 2, 2010), http:www.irs.gov/newsroom/article/0,,id=219731,00.html 9

OTHER AUTHORITIES

AAMC, *Key Facts About Teaching Hospitals* (Feb. 2009), http://www.aamc.org/newsroom/presskits/keyfactsabouttth.pdf 16, 17

AAMC, *The Physician Shortage and Health Care Reform* (July 2009), http://www.aamc.org/newsroom/presskits/physicianshortagefs.pdf 16

AAMC, *What Roles Do Teaching Hospitals Fulfill* (2009), http://www.aamc.org/about/teachhosp_facts1.pdf 17, 18

ACGME, *Outcome Project: Frequently Asked Questions* (2010), http://www.acgme.org/outcome/about/faq.asp 15

AHA, *Beyond Health Care: The Economic Contribution of Hospitals* (Apr. 2008), http://www.aha.org/aha/trendwatch/2008/twapr2008econcontrib.pdf 12, 13, 14

TABLE OF AUTHORITIES
(continued)

Page(s)

AHA, *Community Connections: Ideas & Innovations for Hospital Leaders, Case Examples 5* (Jan. 2010), http://www.caringforcommunities.org/caringforcommunites/content/10commconncasecx.pdf 12, 14

AHA, *Hospitals Continue to Feel Lingering Effects of the Economic Recession* (June 2010), http://www.aha.org/aha/content/2010/pdf/10june-econimpact.pdf 18, 20, 21

AHA, *Teaching Hospitals: Their Impact on Patients and the Future Health Care Workforce* (Sept. 2009), http://www.aha.org/aha/trendwatch/2009/twsept2009teaching.pdf ..... *passim*

AHA, *Teaching Hospitals—Social Missions at Risk* (May 2002), http://www.aha.org/aha/trendwatch/2002/twmay2002.pdf 16, 17

AHA, *The Economic Crisis: Ongoing Monitoring of Impact on Hospitals* (Nov. 11, 2009), http://www.aha.org/aha/trendwatch/2009/09nov-econimpsurvresults.pdf 18, 20

AHA, *The Economic Downturn and its Impact on Hospitals* (Jan. 2009), http://www.aha.org/aha/trendwatch/2009/twjan2009econimpact.pdf 19, 20, 21

TABLE OF AUTHORITIES
(continued)

Page(s)

AHA, *The State of America's Hospitals—Taking the Pulse* (May 24, 2010), http://www.aha.org/aha/content/2010/pdf/100524-thschartpk.pdf 21

AHA, *Uncompensated Hospital Care Cost Fact Sheet* (Nov. 2009), http://www.aha.org/aha/content/2009/pdf/09uncompensatedcare.pdf 11, 12

AHA, *Underpayment by Medicare and Medicaid Fact Sheet* (Nov. 2009), http://www.aha.org/aha/content/2009/pdf/09medicunderpayment.pdf 13

AHA, *Workforce 2015: Strategy Trumps Shortage* (Jan. 2010), http://www.aha.org/aha/content/2010/pdf/workforce2015report.pdf 16

John D. Colombo *et al.*, *Charity Care for Nonprofit Hospitals: A Legal and Administrative Guide* § 3.02[A] (2009) 12

E. Fuchs, *Simulators Come to Life in Resident Training*, AAMC Reporter (Jan. 2008), http://www.aamc.org/newsroom/reporter/jan08/gme.htm 14

Mayo Clinic, *Annual Report* (2008), http://www.mayoclinic.org/mcitems/mc0700-mc0799/MC0710-2008.pdf 18

The American Hospital Association ("AHA") respectfully submits this brief as *amicus curiae* in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

The AHA is a national not-for-profit association that represents the interests of roughly 5,000 hospitals, health care systems, networks, and other care providers, as well as 37,000 individual members. The members of the AHA are committed to finding innovative and effective ways of improving the health of the communities they serve. The AHA educates its members on health care issues and trends, and it also advocates on their behalf in legislative, regulatory, and judicial fora to ensure that their perspectives and needs are understood and addressed. The AHA's members include teaching hospitals that sponsor medical residency programs as well as other participants in the health care field that benefit from the existence of a robust cadre of teaching hospitals. The AHA therefore has a significant interest in the validity of the Treasury Department's regulation deeming all medical residents to be categorically excluded from coverage under the "student" exemption from Social Security taxes codified in 26 U.S.C. § 3121(b)(10).

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[1] The parties have consented to the filing of this brief and their letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Nationwide, the amount of Social Security taxes levied each year for medical residents is estimated to be approximately $700 million. Pet. 20. On April 1, 2005, a Treasury Department regulatory amendment went into effect that categorically excludes medical residents from Social Security's "student" exemption, simply because residents, in addition to the lectures, conferences, and other types of more formal classroom education that they receive, perform at least 40 hours a week of supervised patient care. *See Mayo Found. for Med. Educ. & Research v. United States*, 568 F.3d 675, 676-78 (8th Cir. 2009) ("*Mayo III*"). The amendment thus forecloses teaching hospitals from demonstrating that their residents are nonetheless properly characterized as "students" under the longstanding regulatory definition, which otherwise takes account of all relevant facts and circumstances and does not place dispositive significance on the hours spent performing services. *See id.* Notably, when teaching hospitals and the Government have litigated the specific issue whether medical residents fall within the longstanding definition notwithstanding their long hours of supervised patient care, courts appear to have uniformly ruled in favor of the hospitals. In short, the amended regulation subjects teaching hospitals to Social Security taxation based upon an arbitrary and immaterial fact.

Consequently, the practical effect of the amended regulation is to "divert the scarce resources of our country's teaching hospitals and medical schools from their crucial missions of patient care, physician training, and medical research" in a manner that

Congress did not intend, 15 U.S.C. § 37b(a)(1)(E)—the same type of diversion that Congress deemed so deleterious in 2004 that it passed special legislation shielding teaching hospitals from antitrust lawsuits challenging the matching process those hospitals used to select residents. *Id.* § 37b(b). Notably, since 2004, the economic climate has simultaneously rendered the myriad services our nation's hospitals provide for their communities all the more "crucial" and the resources of those hospitals even more "scarce." Teaching hospitals are, among other things, a critical part of the safety net protecting indigent patients in need of health care and health education, yet the economic downturn has increased the size of the population in need of such protection while challenging the ability of hospitals to continue providing such protection.

For the foregoing reasons, it is of vital importance that this Court reverse the judgment of the Eighth Circuit and invalidate the Treasury Department's arbitrary regulation.

ARGUMENT

I. THE TREASURY DEPARTMENT'S CATEGORICAL EXCLUSION OF MEDICAL RESIDENTS FROM THE "STUDENT" EXEMPTION IS ARBITRARY

In 1939, Congress exempted from Social Security taxation under the Federal Insurance Contributions Act any "service performed in the employ of a school, college, or university" by a "student who is enrolled and is regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10). For over sixty years, the Treasury Department's regulation implementing the "student" exemption

essentially instructed that "student" status should be determined "on the basis of the relationship of [the] employee with the organization for which the services are performed" and that "[a]n employee who performs services ... as an incident to and for the purpose of pursuing a course of study ... has the status of a student in the performance of such services." *See* 26 C.F.R. § 31.3121(b)(10)-2(c) (pre-Apr. 1, 2005).

That regulation required a case-specific inquiry into all of the relevant "facts and circumstances" concerning a putative student's employment. *See Mayo Found. for Med. Educ. & Research v. United States*, 503 F. Supp. 2d 1164, 1176 n.12 (D. Minn. 2007) ("*Mayo II*"), *rev'd on other grounds by Mayo III*; *see also United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1253 (11th Cir. 2007) ("case-by-case analysis is necessary to determine whether a medical resident ... qualifies for ... the student exemption"); *Univ. of Chi. Hosps. v. United States*, 545 F.3d 564, 570 (7th Cir. 2008) ("case-by-case analysis is required to determine whether medical residents qualify for the [student] exemption"); *United States v. Detroit Med. Ctr.*, 557 F.3d 412, 417-18 (6th Cir. 2009) ("need to know what the residents in the program do and under what circumstances"); *United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 28 (2d Cir. 2009) ("particularized review [necessary] of whether ... medical residents [at issue] qualify for the student exclusion").

A. Courts Have Uniformly Ruled That Medical Residents Are Students Under The Case-Specific "Facts And Circumstances" Inquiry

Of critical importance here, when teaching hospitals have litigated this case-specific issue against the Government in the context of medical residents, courts have *uniformly* ruled in their favor in every case of which the AHA is aware. *See United States v. Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997 (D. Minn. 2003) ("*Mayo I*"); *Regents of the Univ. of Minnesota v. United States*, No. 06-5084, 2008 WL 906799 (D. Minn. Apr. 1, 2008) ("*Regents*"), *rev'd on other grounds by Mayo III*; *United States v. Mount Sinai Med. Ctr. of Fla.*, No. 02-22715, 2008 WL 2940669 (S.D. Fla. July 28, 2008) ("*Mt. Sinai*"); *Ctr. for Family Med. v. United States*, No. 05-4049, 2008 WL 3245460 (D.S.D. Aug. 6, 2008) ("*CFM*"); *see also Minnesota v. Chater*, No. 4-96-756, 1997 WL 33352908 (D. Minn. May 21, 1997), *aff'd sub nom. Minnesota v. Apfel*, 151 F.3d 742 (8th Cir. 1998) (involving analogous student exemption under the Social Security Act). In finding that the "student" exemption applied to medical residents, these courts generally emphasized the same basic points.

First, post-medical-school residency programs provide critical substantive education. They are "organized according to comprehensive, educational curricula, as dictated and approved by ... pertinent accrediting bod[ies] and other prevailing educational standards." *Mt. Sinai*, 2008 WL 2940669, at *15. The "curricul[a]" of these programs include numerous types of conventional classroom-style learning, such as reading relevant "textbooks and

journal articles," attending "lectures and conferences," taking "examinations," and receiving "grade[s]" on overall "performance." *Mayo I*, 282 F. Supp. at 1004, 1016; *see also Mt. Sinai*, 2008 WL 2940669, at *16-17, 29-30; *CFM*, 2008 WL 3245460, at *3, 9; *Regents*, 2008 WL 906799, at *6; *Chater*, 1997 WL 33352908, at *7. This post-medical-school education is necessitated by the complexity of modern medicine. Completion of a residency program is virtually essential to practicing medicine in a given field or to obtaining privileges to work at a hospital. *See Mt. Sinai*, 2008 WL 2940669, at *3 n.6; *Mayo I*, 282 F. Supp. 2d at 1007; *CFM*, 2008 WL 3245460, at *10.

Second, although medical residents spend significant amounts of time providing patient-care services under the supervision of attending faculty doctors, the performance of such services is likewise essential to their education. "[T]he principal classroom for residents must be the clinical setting because patient care in a medical specialty is what residents are receiving training for." *Mayo I*, 282 F. Supp. 2d at 1015. In other words, "[p]laying just an observational role in this [context] is not the same as actually being involved directly in patient care," and so "it is impossible to separate 'education' from 'patient care.'" *See id.* at 1014-15; *see also Mt. Sinai*, 2008 WL 2940669, at *9, 26-27; *CFM*, 2008 WL 3245460, at *9, 11; *Regents*, 2008 WL 906799, at *6; *Chater*, 1997 WL 33352908, at *7. Notably, the "patient care activities" performed in residencies are "quite analogous" to those "that occur in the third and fourth years of medical school"—although the resident "takes on" "progressively more and more responsibility," the services remain "always under

the supervision of the attending faculty." *See Mt. Sinai*, 2008 WL 2940669, at *4-5, 23, 35. Moreover, even in the context of patient care, residents and their attending "participate in daily teaching rounds" that are "more traditionally 'didactic,'" during which the attending "draw[s] out and explore[s] all of the salient teaching points presented by each patient." *Mayo I*, 282 F. Supp. 2d at 1016; *see also Mt. Sinai*, 2008 WL 2940669, at *6.

Third, teaching hospitals offer residency programs to train the future generation of doctors, not to obtain a cheap source of labor for providing patient care. Teaching hospitals "could provide patient care far more cost-efficiently *without* residents," due to "the time and effort required to supervise and teach" them as well as, among other things, the "increased costs necessary to purchase better, state of the art equipment ... [and] to hir[e] the best and the brightest teachers." *See Mt. Sinai*, 2008 WL 2940669, at *11 n.12, 24-25; *see also Mayo I*, 282 F. Supp. 2d at 1014, 1018; *Regents*, 2008 WL 906799, at *6. For example, "large portions of the patient-care services performed by residents—such as physical examinations and the review of test results—[are] repeated by the supervising staff physicians who [are] ultimately responsible for the patients' care." *Mayo I*, 282 F. Supp. 2d at 1018. Moreover, the Accreditation Council on Graduate Medical Education ("ACGME")—of which the AHA is a member—explicitly requires that residency programs "must provide services and develop systems to minimize the work of residents that is extraneous to their education programs," consistent with ACGME's status as "a major driving force in the standardization of robust educational curricula

across all teaching hospitals." *See Mt. Sinai*, 2008 WL 2940669, at *7-9. Consequently, residents typically do not "perform ancillary procedures that have no 'educational value' in the residency context." *Id.* at *9; *see also Mayo I*, 282 F. Supp. 2d at 1015; *CFM*, 2008 WL 3245460, at *7.

Finally, and most importantly, "[t]ime alone cannot be the sole measure of the relationship between services performed and a course of study." *Mayo I*, 282 F. Supp. 2d at 1018. Rather, given the inextricably intertwined nature of patient care and medical education, "the patient care services provided by residents ... were [found to be] incidental to and for the purpose of pursuing a course of study in postgraduate medical education." *See id.*; *see also Mt. Sinai*, 2008 WL 2940669, at *35; *CFM*, 2008 WL 3245460, at *9, 11; *Regents*, 2008 WL 906799, at *6.

B. The Treasury Department Has Adopted An Arbitrary 40-Hour Cut-off Rule

In 2005, the Treasury Department amended its regulation implementing the "student" exemption. It generally retained its longstanding regulatory definition of "students," including the "incident to and for the purpose of pursuing a course of study" test, as well as the case-specific, "facts and circumstances" approach for applying that test. But it then categorically decreed that "[t]he services of a full-time employee"—including "an[y] employee whose normal work schedule is 40 hours or more per week"—"are not incident to and for the purpose of pursuing a course of study," *regardless* of whether "the services performed ... may have an educational, instructional, or training aspect." *See* 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(i), (iii) (post-Apr. 1, 2005).

The amended regulation specifically identifies medical residents as an example of a "full-time employee," *id.* § 31.3121(b)(10)-2(e), Ex. 4, consistent with the Department's candid admission that the amendment was designed to abrogate adverse judicial decisions applying the longstanding regulation in favor of medical residents, *see* Petrs. Br. 41-42.

The AHA fully agrees with the myriad reasons Petitioners have given for why the Department's "full-time employee" carve-out is both foreclosed by the statutory text as well as arbitrary and unreasonable. Moreover, as the AHA showed above, the Department's interpretation is inconsistent with a line of judicial interpretations of the "student" exemption that was unbroken until the Eighth Circuit's decision below. *See supra* at Part I.A.

Furthermore, the AHA observes that the Department's current position is especially arbitrary in that it appears to be inconsistent. Under *both* the new and old versions of the Department's regulation, the relevant regulatory test is whether the services performed were "incident to and for the purpose of pursuing a course of study." The Department contends that, under the new version, the performance of 40+ hours is *dispositive*. But, under the old version, every court that considered the question held that the length of time spent by medical residents performing patient-care services was *not dispositive*. Notably, the Department has formally "accept[ed] th[at] position" for tax periods ending before its "new ... regulations went into effect." *See* IR-2010-25 (Mar. 2, 2010), http://www.irs.gov/newsroom/article/0,,id=219731,00.html (last

visited Aug. 11, 2010). Since, however, the Department is entitled to "deference" when interpreting its "own regulations," *see Auer v. Robbins*, 519 U.S. 452, 461 (1997), the Department's acceptance of those courts' interpretation of its old regulation is irreconcilable with the Department's claim that its contrary interpretation in the new regulation is itself entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). After all, either 40+ hours of service is dispositive under the "incident to and for the purpose of pursuing a course of study" regulatory test, or it is not. The Department cannot simultaneously take the enforcement position that it is both.

Finally, the AHA stresses that the practical effect of the Department's arbitrary amendment is significant, in light of the uniform success teaching hospitals have had litigating under the case-specific regulatory interpretation of the "student" exemption, *see supra* at Part I.A, the fact that such litigation has recently "exploded across the country," *Mayo III*, 568 F.3d at 676, and the magnitude of the stakes that are collectively involved, Pet. 20. By depriving hospitals of the ability even to attempt to demonstrate that their medical residents qualify as "students" under the longstanding definition of that term, the amended regulation "divert[s] the scarce resources of our country's teaching hospitals and medical schools from their crucial missions of patient care, physician training, and medical research" in a manner that Congress did not intend. 15 U.S.C. § 37b(a)(1)(E). As discussed below, that diversion is particularly harmful in the current economic climate, which has strained the resources of our nation's

hospitals at the very time our hospitals are being increasingly called upon to act as the safety net for the communities they serve.

II. IN THE FACE OF TRYING ECONOMIC CIRCUMSTANCES, OUR NATION'S HOSPITALS STRIVE TO CONTINUE SERVING THEIR COMMUNITIES IN MYRIAD WAYS

As this Court recognized long ago, "hospitals ... have become centers for the 'delivery' of health care" and thus have "assume[d] a larger community character." *Abbott Labs. v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 11 (1976). For both hospitals generally and teaching hospitals in particular, this "community character" manifests itself in various ways. Yet the current economic climate has posed a serious challenge to the ability of hospitals to maintain the panoply of services that they provide.

A. Hospitals In General Give Back To Their Communities In A Wide Variety Of Ways

1. Hospitals throughout the nation provide "uncompensated care," i.e., "hospital care provided for which no payment was received from the patient or insurer." AHA, *Uncompensated Hospital Care Cost Fact Sheet* at 1 (Nov. 2009) ("*Uncompensated Care*"), http://www.aha.org/aha/content/2009/pdf/09uncompensatedcare.pdf (last visited Aug. 11, 2010). In addition to unanticipated "bad debt," which "is often generated by medically indigent and/or uninsured patients," hospitals also provide "charity care," which "consists of services for which hospitals neither received, nor expected to receive, payment because they had determined, with the assistance of

the patient, the patient's inability to pay." *Id.* at 2. The most common form of charity care involves the free performance of "medically necessary services" for "individuals with annual incomes up to a specified percentage of the [f]ederal [p]overty [l]evel (usually 150 percent to 200 percent)." John D. Colombo *et al.*, *Charity Care for Nonprofit Hospitals: A Legal and Administrative Guide* § 3.02[A] at 3-12 (2009).

But charity care is by no means limited to such emergency services. It often also encompasses care in the form of "free clinics, vaccinations," "health screenings," and other "[s]ubsidized health services." AHA, *Beyond Health Care: The Economic Contribution of Hospitals* at 6 (Apr. 2008) ("*Beyond Health Care*"), http://www.aha.org/aha/trendwatch/2008/twapr2008econcontrib.pdf (last visited Aug. 11, 2010). Various examples of such programs can be found within a recent AHA publication. *See* AHA, *Community Connections: Ideas & Innovations for Hospital Leaders, Case Examples 5* (Jan. 2010) ("*Community Connections*"), http://www.caringforcommunities.org/caringforcommunities/content/10commconncaseex.pdf (last visited Aug. 11, 2010).

Although the precise characterization of what constitutes "uncompensated care" varies somewhat among hospitals, general estimates of the magnitude of the costs of such care are still possible. According to data generated from the AHA's Annual Survey of Hospitals, which is the most comprehensive source of hospital financial data, uncompensated care cost our nation's hospitals $36.4 billion in 2008, which constituted 5.8% of their total expenses (exclusive of bad debt). *Uncompensated Care* at 1-2, 4.

2. In addition to wholly uncompensated care, reimbursement for care provided to Medicare and Medicaid patients, which "account[s] for 55 percent of all care provided by hospitals," frequently "result[s] in underpayment." AHA, *Underpayment by Medicare and Medicaid Fact Sheet* at 1 (Nov. 2009), http://www.aha.org/aha/content/2009/pdf/09medicunderpayment.pdf (last visited Aug. 11, 2010). This underpayment results from the fact that the "[p]ayment rates for Medicare and Medicaid [generally] are set by law rather than through a negotiation process," and "[t]hese payment rates are currently set below the costs of providing care" in most hospitals. *Id.*

According to aggregate data generated from the AHA's Annual Survey of Hospitals, "hospitals received payment of only 91 cents for every dollar spent ... caring for Medicare patients in 2008," and "only 89 cents for every dollar spent ... caring for Medicaid patients in 2008." *Id.* at 2 (emphases omitted). Combined underpayments amounted to $32.4 billion in 2008, a massive increase from 2000, when the equivalent amount was only $3.8 billion. *Id.* at 3.

3. Nor are the services hospitals perform for their communities strictly limited to the provision of traditional health care. "Hospitals offer services that aid in disease prevention, promote health awareness, contribute to advances in medicine and address other societal needs." *Beyond Health Care* at 6. For example, "community programs" offered by hospitals include "[h]ealth programs[,] such as educational outreach ... and support groups," and "[p]rograms to address the social needs of communities," such as

"Meals on Wheels" and "various [types of] shelters." *Id.*; *see also Community Connections*. Hospitals also conduct "[c]linical research" and provide "training programs" and "[c]ontinuing education for health professionals." *Beyond Health Care* at 6.

B. Teaching Hospitals In Particular Provide A Wide Variety Of Benefits To Their Communities

1. Most obviously, the nation's teaching hospitals perform the invaluable task of training the next generation of physicians. As discussed at length in the cases cited above, that typically requires immersing residents, while supervised, in the real-world performance of patient care. *See supra* at 6-8. That said, it is a particularly telling reflection of the prioritization of the educational aspect of medical residency programs over the patient-care aspect of such programs that some teaching hospitals have begun "removing patients from the training equation, at least initially," in favor of "computer-based simulators to hone the skills" of residents. E. Fuchs, *Simulators Come to Life in Resident Training*, AAMC Reporter (Jan. 2008), http://www.aamc.org/newsroom/reporter/jan08/gme.htm (last visited Aug. 11, 2010). This demonstrates how supervised patient care in residency programs is simply a step in the continuum of educating physicians, rather than the object of residency programs *per se*. Indeed, "[a]lthough simulation is an expensive venture," its "proponents claim this technology is an important educational tool." *See id.*

More generally, "[i]n keeping with the ACGME's mission to ensure and improve the quality of

graduate medical education," the ACGME is pushing forward with its "Outcome Project," which "is a long-term initiative by which [it] is increasing emphasis on educational outcome assessment in the accreditation process." ACGME, *Outcome Project: Frequently Asked Questions* (2010), http://www.acgme.org/outcome/about/faq.asp (last visited Aug. 11, 2010). The ACGME is focused on "educational outcomes" in medical residencies, rather than "clinical outcomes," because "[a]chievement of learning is the ultimate purpose of any well-structured educational activity." *Id.*

And teaching hospitals wholeheartedly embrace that purpose, enabling residents to engage in supervised patient care because of the pedagogical benefits, notwithstanding the fact that the provision of such care is far less cost-efficient for the hospitals. As the AHA has explained in the past, "[t]raining resident physicians involves significant costs beyond those customarily associated with patient care," because, in addition to the fact that "the involvement of trainees in care reduces the overall efficiency of hospital operations," "teaching hospitals must pay for faculty, faculty offices, classroom space, comprehensive medical libraries[,] and advanced, highly sophisticated technological equipment to support their residency programs." AHA, *Teaching Hospitals: Their Impact on Patients and the Future Health Care Workforce* at 3 (Sept. 2009) ("*Teaching Hospitals*"), http://www.aha.org/aha/trendwatch/2009/twsept2009teaching.pdf (last visited Aug. 11, 2010).

Teaching hospitals nonetheless serve this function, in part, because they recognize that the task of training the next generation of physicians is

particularly critical given recent estimates that there will be a "shortage of 124,000 physicians" "by 2025." *Id.* at 4; *see generally* AHA, *Workforce 2015: Strategy Trumps Shortage* (Jan. 2010), http://www.aha.org/aha/content/2010/pdf/workforce2015report.pdf (last visited Aug. 11, 2010). And, of course, there is an even greater need for well-trained doctors given the recent enactment of health-care reform, which was estimated last year to "add to overall demand for doctors and increase the projected [2025] shortfall by 25 percent." Association of American Medical Colleges ("AAMC"), *The Physician Shortage and Health Care Reform*, at 1 (July 2009), http://www.aamc.org/newsroom/presskits/physicianshortagefs.pdf (last visited Aug. 11, 2010).

All that said, while the primary purpose of medical residency programs is to provide adequate education to novice residents so they can become effective physicians, that is far from the only service that teaching hospitals provide to their communities.

2. Although hospitals generally act as a safety net for their community, *see supra* at Part II.A, teaching hospitals are among the highest providers of uncompensated care and community programs. For example, in 2006, teaching hospitals incurred 71% of total charity care costs among hospitals surveyed while constituting only 22% of the hospitals surveyed. AAMC, *Key Facts About Teaching Hospitals* at 6 (Feb. 2009) ("*Key Facts*"), http://www.aamc.org/newsroom/presskits/keyfactsaboutth.pdf (last visited Aug. 11, 2010); *see also* AHA, *Teaching Hospitals—Social Missions at Risk* at 2 (May 2002) ("*Social Missions*"), http://www.aha.org/aha/trendwatch/2002/twmay2002.pdf (last visited Aug. 11,

2010). Teaching hospitals likewise play an exemplary role in providing community programs, such as AIDS services, substance abuse outpatient services, and crisis prevention assistance. *See Key Facts* at 5.

3. Furthermore, as the AHA recently documented, "[t]eaching hospitals play distinct roles in their communities' care delivery systems [by] offering specialized services not available in other facilities." *Teaching Hospitals* at 1. "76 percent of hospitals that provide heart transplants are teaching institutions," and "teaching hospitals treat[] approximately 96 percent of all patients needing burn care services and 91 percent of all patients needing pediatric intensive care services." *Id.* at 1-2; *see also Key Facts* at 3-4; AAMC, *What Roles Do Teaching Hospitals Fulfill* at 2 (2009) ("*What Roles*"), http://www.aamc.org/about/teachhosp_facts1.pdf (last visited Aug. 11, 2010); *Social Missions* at 2.

Consequently, "patients often are transferred to [teaching] hospitals when their medical needs exceed other facilities' capabilities." *Teaching Hospitals* at 2. For example, "[i]n 2006[,] there were 321,567 Medicare patient transfers, 72 percent of which were to teaching hospitals." *Id.* More generally, the AAMC estimates that teaching hospitals "receive more than 40 percent of all transferred patients whose illnesses or injuries require a sophisticated level of technology and expertise not available at a community hospital." *What Roles* at 2.

4. Last, but certainly not least, "[t]eaching hospitals serve as centers of research and innovation, helping to develop new treatments and cures." *Teaching Hospitals* at 1. Among the countless

number of breakthroughs pioneered at teaching hospitals were "[t]he first live polio vaccine, intensive care unit for newborns and pediatric heart transplant," *id.*, as well as the "[f]irst human images with an MRI," the "[f]irst successful double-lung transplant," and the "[f]irst successful surgery on a fetus in utero," *What Roles* at 1. The cost of such research is substantial. For instance, one of the petitioners in this case, the Mayo Clinic, spent $390.8 million in 2008 on research and education that was not externally sponsored. Mayo Clinic, *Annual Report* at 43 (2008), http://www.mayoclinic.org/mcitems/mc0700-mc0799/MC0710-2008.pdf (last visited Aug. 11, 2010).

C. The Current Economic Climate Threatens The Ability Of Hospitals To Continue To Serve Their Communities

1. According to a recent AHA survey conducted in March of 2010, "[n]early three-quarters of hospitals reported reduced operating margins." AHA, *Hospitals Continue to Feel Lingering Effects of the Economic Recession*, at 1 (June 2010) ("*Lingering Effects*"), http://www.aha.org/aha/content/2010/pdf/10june-econimpact.pdf (last visited Aug. 11, 2010). These responses were similar to those received in an AHA study conducted in August of 2009, which showed that a third of hospitals experienced losses in the first half of 2009 and nearly half of hospitals suffered a moderate or significant decrease in operating margins. AHA, *The Economic Crisis: Ongoing Monitoring of Impact on Hospitals* at 12-13 (Nov. 11, 2009) ("*Economic Crisis*"), http://www.aha.org/aha/trendwatch/2009/09nov-econimpsurvresults.pdf (last visited Aug. 11, 2010). Likewise, as of

November of 2008, Moody's "downgraded the outlook for the not-for-profit hospital sector from stable to negative." AHA, *The Economic Downturn and its Impact on Hospitals* at 2 (Jan. 2009) ("*Economic Downturn*"), http://www.aha.org/aha/trendwatch/2009/twjan2009econimpact.pdf (last visited Aug. 11, 2010).

2. This data reflects the myriad ways in which the economic downturn affects the financial health of hospitals. Most notably, "[w]hen the economy weakens, hospitals see fewer elective cases, provide more charity care, absorb more bad debt, and care for an increasing share of Medicaid patients." *Id.*

Given that "[m]ore than 60 percent of Americans get their health insurance through employers," "[t]he recent growth in unemployment" has simultaneously "resulted in a loss of employer-sponsored insurance" and "swelled Medicaid enrollment." *Id.* at 4. At the same time, "state tax revenue ... is falling precipitously," which has dire implications for Medicaid, since it "is funded primarily by state tax revenue" and usually constitutes "the single largest state budget item." *Id.* at 1. As a result, Medicaid "is particularly vulnerable to cuts in ... provider payment[s]," which directly affect hospitals, as well as "to cuts in eligibility [and] benefits," which indirectly "stress[] hospitals and other providers" of charity care. *Id.* And hospitals' operating revenue is further reduced by the fact that "patients put off elective procedures" during an "economic downturn." *Id.* at 5. Indeed, "many people who cannot afford care will delay seeking it until their conditions worsen and their treatment becomes even more expensive," such that "hospitals are likely to see

initial drops in patients seeking care followed by an influx of emergency department visits when needs can no longer be put off." *Id.* at 6.

As documented in the AHA's recent survey in March, 87% of hospitals report increased bad debt and charity care as a percentage of total revenues, 65% report increased percentages of patients covered by Medicaid and similar programs, and 72% report decreased numbers of elective procedures. *Lingering Effects* at 1. Again, this was in accord with the AHA's study from the autumn of 2009, in which 59% of hospitals found a moderate or significant increase in emergency department visits by uninsured patients, 69% found a moderate or significant increase in uncompensated care as a percent of total gross revenues, 52% found a moderate or significant increase in need for subsidized services, and 43% found a moderate or significant decrease in inpatient and elective care. *Economic Crisis* at 5-8.

3. These effects from the current economic downturn are compounded by the "'once in a century' credit crisis" plaguing the country. *Economic Downturn* at 2. Hospitals often rely on credit because "payment to hospitals traditionally lags behind care delivery," requiring them to "borrow to meet operating expenses." *Id.* at 3. They likewise "borrow to fund ... longer-term facility improvements and technology purchases." *Id.* at 2. Yet even "the municipal bond market, which historically has been a very stable and reliable means of raising cash for both hospitals and local governments, has been roiled by the credit crisis." *Id.* at 3. Consequently, credit for hospitals has become "difficult to secure" and "significantly more expensive when obtained."

Id. According to the AHA's recent March survey, "difficulties accessing capital persist for hospitals, with 44 percent reporting reduced access to capital continues and nearly a quarter reporting that their ability to access capital is getting worse." *Lingering Effects* at 2.

4. Given the significant role that teaching hospitals, in particular, play in providing care to the indigent, *see supra* at 16-17, it follows that "the economic crisis may put particular strain on teaching facilities' resources to support their training programs and their role in the safety net." *Teaching Hospitals* at 5. As of September of 2009, "49 percent of teaching hospitals ha[d] seen a moderate to significant jump in the proportion of patients covered by Medicaid or other public programs for low-income populations compared to [the prior] year." *Id.* at 2. And, during the same period, "27 percent" of teaching hospitals "reported a 'significant decrease' ... in operating margin," "52 percent ... reduced their staff, and 29 percent ... cut services such as behavioral health programs." *Id.* at 5, 6. In addition, over half of all teaching hospitals in the AHA's recent survey in March reported that they were at or over capacity in their emergency departments. AHA, *The State of America's Hospitals—Taking the Pulse*, at 7 (May 24, 2010), http://www.aha.org/aha/content/2010/pdf/100524-ths chartpk.pdf (last visited Aug. 11, 2010). In these circumstances, a potential savings of up to $700 million in Social Security taxes for medical residents, Pet. 20, could be critical to the financial health of our nation's teaching hospitals.

5. In sum, the current economic climate has impaired the financial health of our nation's hospitals, including teaching hospitals, at the same that it has rendered hospitals' services for the health of their communities all the more critical. In 2004, Congress interceded to prevent an unintended "diver[sion] [of] the scarce resources of our country's teaching hospitals and medical schools from their crucial missions of patient care, physician training, and medical research." 15 U.S.C. § 37b(a)(1)(E). Now, this Court should reverse the Eighth Circuit's authorization of a similar diversion by the Treasury Department, which arbitrarily excludes medical residents from the "student" exemption and thereby forecloses teaching hospitals from proving in court, as they have successfully and repeatedly done in the past, that their residents, despite performing long hours of supervised patient care, fall within the longstanding regulatory definition of the term.

CONCLUSION

For the foregoing reasons, the Treasury Department's regulation should be invalidated and the Eighth Circuit's judgment should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR AMICI CURIAE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, AMERICAN COUNCIL ON EDUCATION, ASSOCIATION OF AMERICAN UNIVERSITIES, ASSOCIATION OF PUBLIC AND LAND-GRANT UNIVERSITIES, AMERICAN OSTEOPATHIC ASSOCIATION, AND AMERICAN ASSOCIATION OF COLLEGES OF OSTEOPATHIC MEDICINE IN SUPPORT OF PETITIONERS

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Davis v. *Mann*, 882 F.2d 967 (5th Cir. 1989)..... 17

Dent v. *West Virginia*, 129 U.S. 114 (1889)..... 21

Minnesota v. *Apfel*, 151 F.3d 742 (8th Cir. 1998) 8

Mizell v. *United States*, 663 F.2d 772 (8th Cir. 1981) 11

Peel v. *Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990) 10, 11

Rhode Island Hosp. v. *Leavitt*, 548 F.3d 29 (1st Cir. 2008)..... 22

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Univ. of Chicago Hosps. v. *United States*, 545 F.3d 564 (7th Cir. 2008)..... 8, 9

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United States v. *Detroit Med. Ctr.*, 557 F.3d 412 (6th Cir. 2009) 9

United States v. *Mayo Found. For Med. Educ. & Research*, 282 F. Supp. 2d 997 (D. Minn. 2003) 9, 14-18

United States v. *Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19 (2d Cir. 2009) 9

United States v. *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248 (11th Cir. 2007) 9

United States v. *Mount Sinai Med. Ctr. of Fla., Inc.*, No. 02-22715-CIV, 2008 WL 2940669 (S.D. Fla. July 28, 2008) 9-14, 17, 18

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42 U.S.C. § 1395ww(d)(5)(B) 22

42 U.S.C. § 1395ww(h) 22

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Idaho Code Ann. § 54-1803(c)(12) 10

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Tex. Occ. Code Ann. § 155.003(5) 10

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42 C.F.R. § 415.152 13

OTHER AUTHORITIES:

Accreditation Council of Graduate Medical Education ("ACGME"), *The ACGME's Approach to Limit Resident Duty Hours 2007-08* 24

ACGME, *Common Program Requirements.* 12

ACGME, *Core Competencies* 16

ACGME, *Duty Hours Language* 21

ACGME, *Institutional Requirements* 14, 15

ACGME, *Memorandum* (March 1, 2000) 12

ACGME, *Policy on "Moonlighting" by GME Resident* 18

TABLE OF AUTHORITIES—Continued

Page(s)

ACGME, *Program Requirements for Graduate Medical Education in Child and Adolescent Psychiatry* 15

ACGME, *Understanding the Difference Between Accreditation, Licensure and Certification* 10

American Board of Medical Specialties, *Evaluating the Skills of Medical Specialists* (1983) 11

American Osteopathic Association, *Basic Documents for Postdoctoral Training* (2010) 12, 13, 14, 18

Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 Geo. L. J. 1749 (1995) 11, 13

Department of Health & Human Services, *Hospital Prospective Payment for Medicare: A Report to Congress* (1982) 22

Federation of State Medical Boards, *State-specific Requirements for Initial Medical Licensure* 10

Government Accountability Office, Report GAO-09-438R (May 4, 2009) 17, 18, 24

Tim M. Henderson, *Medicaid Direct and Indirect Graduate Medical Education Payments: A 50-State Survey* (April 2010) 22

Internal Revenue Service, News Release IR-2010-25 (Mar. 2, 2010) 23

TABLE OF AUTHORITIES—Continued

Page(s)

Darrell G. Kirch, *How To Fix The Doctor Shortage*, Wall St. J., Jan. 5, 2010 26

Oxford Universal Dictionary (3d ed. 1955) 20

National Residency Matching Program, *About Residency* 14

Teryl K. Nuckols, et al., *Cost Implications of Reduced Work Hours and Workloads for Resident Physicians*, 360 New Eng. J. Med. 2202 (2009) 26

Patrick Timothy Rowe, *The Impossible Student Exception to FICA Taxation and Its Applicability to Medical Residents*, 66 Wash. & Lee L. Rev. 1369 (2009) 9

Social Security Administration, *Social Security & Medicare Tax Rates* 25

Suzanne Sataline & Shirley S. Wang, *Medical Schools Can't Keep Up*, Wall St. J., April 13, 2010 26

Webster's New International Dictionary (2d ed. 1945) 21

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INTEREST OF AMICI CURIAE

The **Association of American Medical Colleges** ("AAMC") is a nonprofit educational association whose members include all 133 accredited allopathic medical schools in the United States, approximately 400 major teaching hospitals and health systems,

and nearly 90 scientific societies.[1] Collectively, these institutions and organizations sponsor the vast majority of the nation's medical residents. AAMC's mission is to improve the nation's health by strengthening the quality of medical education and training, enhancing the search for biomedical knowledge, advancing health services research, and integrating education and research into the provision of effective health care.

The **American Council on Education** ("ACE") was founded in 1918 and is the nation's unifying voice for higher education. Its more than 1,800 members include colleges and universities throughout the United States. ACE represents all sectors of American higher education and serves as a consensus leader on key issues affecting higher education. ACE participates as an amicus curiae only in cases that raise issues of widespread importance to institutions of higher education. ACE, for example, has filed briefs in this Court in recent years in cases such as *Christian Legal Society* v. *Martinez*, 130 S. Ct. 2971 (2010) and *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007).

The **Association of American Universities** ("AAU") is a nonprofit association of 61 U.S. and two Canadian preeminent public and private research universities. Founded in 1900, AAU focuses on national and institutional policies that promote strong

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

programs of university research and undergraduate, graduate, and professional education. Well over half of AAU member universities have medical schools and medical residency programs, and all have strong programs of biomedical research and advanced education that will provide the future doctors, researchers, and medical breakthroughs that will enhance the health and well-being of the nation.

Founded in 1887, the **Association of Public and Land-grant Universities** ("A-P-L-U") is an association of public research universities, land-grant institutions, and many state public university systems. A-P-L-U member campuses enroll more than 3.5 million undergraduate and 1.1 million graduate students, employ more than 645,000 faculty members, and conduct nearly two-thirds of all academic research, totaling more than $34 billion annually. As the nation's oldest higher education association, A-P-L-U is dedicated to excellence in learning, discovery and engagement.

The **American Osteopathic Association** ("AOA"), an Illinois not-for-profit corporation, is a member association representing more than 70,000 osteopathic physicians ("DOs"). The AOA, founded in 1897, is the accrediting agency for all osteopathic medical colleges, osteopathic residency training programs, and osteopathic continuing medical education, and accredits health care facilities. The AOA's 18 certifying boards serve as the primary certifying body for DOs who complete osteopathic residency training. The AOA's mission is to advance the distinctive philosophy and practice of osteopathic medicine.

The **American Association of Colleges of Osteopathic Medicine** ("AACOM") represents the

administrations, faculty, and students of the nation's 26 colleges of osteopathic medicine and three branch campuses that offer the doctor of osteopathic medicine degree. Today, more than 18,000 students are enrolled in osteopathic medical schools at 34 locations in 25 states. Nearly one in five U.S. medical students is training to be an osteopathic physician. In 2010, colleges of osteopathic medicine graduated 3,845 students eligible to enter post-graduate medical training. AACOM's mission is to promote excellence in osteopathic medical education, research, and service and foster innovation and quality among osteopathic colleges to improve the health of the American public.

Amici have a substantial interest in the outcome of this case. Their member medical schools, teaching hospitals and universities and the training programs they sponsor provide clinical education for medical residents and are therefore directly affected by the Eighth Circuit's holding that residents are categorically ineligible for the student exemption to the Federal Insurance Contribution Act ("FICA").

Amici are committed to protecting the student status of medical residents. Education is the predominant consideration in developing and implementing medical residency programs. Medical residents are students, acquiring the knowledge to deliver safe and effective healthcare and, by the completion of their residencies, to practice as independent, fully-licensed physicians. This educational regimen is the basis for the United States' ability to provide the best medical care in the world. By categorically eliminating the student exemption for medical residency programs and residents, the Treasury Department's arbitrary "40-

hour" exception uses a single criterion to make a judgment that is contrary to any basic understanding of the totality of residency training.

SUMMARY OF THE ARGUMENT

Congress exempted from FICA taxation all services performed in the employ of a school, college or university by any "student" who is enrolled and regularly attending classes at such institutions. 26 U.S.C. § 3121(b)(10). Reversing decades of consistent administrative practice, the Treasury Department has decreed that no medical residents can ever be "students," solely because their "normal work schedule is 40 hours or more per week." 26 C.F.R § 31.3121(b)(10)-2(d)(3)(iii), (e). The question in this case is whether this categorical regulatory exclusion is unlawful because it contravenes the plain language of the statute or is otherwise arbitrary or capricious.

The regulation is invalid. Residencies are educational programs and residents are "students" under any reasonable understanding of that word. Medical school graduates do not enter residencies because they need a paid job, but because completion of a residency is the next required step in their goal of becoming a physician who can practice independently. Completion of at least one year of a residency is an *educational* prerequisite to becoming a fully licensed physician in all 50 states. Completion of a residency also is required if a physician wishes to attain "board certification" in his or her medical specialty, a credential that is increasingly becoming necessary, and generally is required by hospitals for physicians who wish to be granted privileges.

Residents are not "junior doctors" in the first stage of their working life; rather, they are engaged in a rigorous course of graduate clinical education that prepares them for the working life that will follow. To be accredited, all residency programs must meet strict criteria to ensure their educational content. Residents must follow study curricula, attend educational conferences and lectures, engage in other scholarly activities, take exams and be continually evaluated. The tasks in which they engage have educational value. They learn by observing faculty members on their "rounds" and by obtaining hands-on clinical experience under the supervision of a faculty member. The federal Medicare program has also recognized the educational value of residency programs by providing direct graduate medical education funding, which pays institutions that sponsor residency programs for some costs of residency training.

The Treasury Department's mandate that residents can never be "students" merely because their normal weekly work schedule is 40 hours or more contravenes the statute's plain language. It creates the backwards rule that individuals cease to be "students" simply because their education requires more time. But patients do not get sick on a set schedule, and physicians must learn how to care for them the right way, even if it means investing a substantial amount of time. Learning how to diagnose, treat, and provide follow-up to patients with complex medical and surgical conditions entails sustained commitment beyond a typical work day. Under the regulations, a resident with a "normal work schedule" of 39 hours could be a "student." But he or she would arbitrarily lose that status simply by

receiving another hour of education or, in the case of many residents, by receiving twice as much. That perverse result is not only inconsistent with the plain meaning of the term "student" but is the very definition of arbitrary government action.

While pursuing the residency component of their education, medical residents are paid a stipend that is relatively modest, given that they have already completed four years of graduate school and are now engaging in a prolonged and intense educational experience. By taxing the stipends received by residents—and thereby taxing the time they devote to learning how to become physicians—the Government's categorical rule fails to acknowledge the nature of residency education to the possible detriment of both residents and the institutions where they train.

ARGUMENT

I. MEDICAL RESIDENTS ARE STUDENTS.

The governing statute exempts from FICA taxation any "service performed in the employ of * * * a school, college, or university * * * if such service is performed by *a student* who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10) (emphasis added). The challenged regulations do not preclude medical residents from proving—as the trial court in this case found—that they are both in the "employ of," and "enrolled and regularly attending classes at," a school, college, or university. However, the Treasury Department has imposed a blanket rule that residents are not "students" within the meaning of the statute merely because their "normal work schedule is 40 hours or more per week." 26 C.F.R. §

31.3121(b)(10)-2(d)(3)(iii).[2] Because it is undisputed that medical residents' schedules far exceed that amount, the regulations bar them from ever being considered "students." *See also* 26 C.F.R. § 31.3121(b)(10)-2(e) (example 4) (medical residents categorically ineligible to claim exemption).

The Treasury Department's categorical exclusion entirely—and quite deliberately—ignores the purpose of residency training and the way in which it is conducted. It is no accident that the current regulations eschew any "case-by case examination" of the "individual's relationship with a school," *Minnesota* v. *Apfel*, 151 F.3d 742, 747-48 (8th Cir. 1998), in favor of an arbitrary 40-hour rule that is entirely disconnected from *what* residents are doing during those hours and *why* they are doing it. The regulations were specifically drafted to try to evade a cascade of judicial decisions holding that "[t]he student exception unambiguously does *not* categorically exclude medical residents as 'students'

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[2] Under the regulation, individuals employed by, enrolled in, and regularly attending classes at a school, college or university must meet the "addition[al]" requirement that their services be "incident to and for the purpose of pursuing a course of study" in order to qualify as "students" who can claim the statutory exemption. 26 C.F.R. § 31.3121(b)(10)-2(d). But "[t]he services of a full-time employee are not incident to and for the purpose of pursuing a course of study," and "an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee." 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii). Thus, the regulation categorically precludes residents from claiming that they are "students," but does *not* preclude them from satisfying (on a case-by-case basis) the separate requirement that they be employed by, enrolled in, and regularly attending classes at an educational institution. Residents sponsored by schools, colleges or universities, such as the petitioners in this case, easily meet that requirement. *See* Pet. App. 60a-65a.

potentially eligible for exemption from payment of FICA taxes." *Univ. of Chicago Hosps.* v. *United States*, 545 F.3d 564, 565 (7th Cir. 2008).[3]

The regulations are designed to preclude any factual inquiry because courts that have closely examined the actual facts have concluded that the purpose and substance of residency programs is to educate residents, not put them to work.[4] Under any "detailed review" of graduate medical education—precisely what the regulations improperly seek to avoid—medical residents "presumptively qualify" for the student exemption. Patrick Timothy Rowe, *The Impossible Student Exception to FICA Taxation and Its Applicability to Medical Residents*, 66 Wash. & Lee L. Rev. 1369, 1399 (2009). Indeed, residents training in a program that is sponsored by accredited educational institutions should always qualify for the exemption.

1. Graduation from medical school does not make one a fully qualified clinician. It is through the completion of residency training that a medical school graduate becomes able to fully and effectively practice medicine. Graduation from medical school

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[3] *See also United States* v. *Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27 (2d Cir. 2009) (student exemption unambiguous, and can cover residents enrolled in medical residency programs and attending classes); *United States* v. *Detroit Med. Ctr.*, 557 F.3d 412, 417-18 (6th Cir. 2009) (same); *United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1251-56 (11th Cir. 2007) (same).

[4] *See Ctr. for Fam. Med.* v. *United States*, No. 05-4049, 2008 WL 3245460, at *8-11 (D.S.D. Aug. 6, 2008); *United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, No. 02-22715-CIV, 2008 WL 2940669, at *2 (S.D. Fla. July 28, 2008); *United States* v. *Mayo Found. for Med. Educ. & Res.*, 282 F. Supp. 2d 997, 1015-18 (D. Minn. 2003) ("*Mayo I*"); Pet. App. 35a n.5, 40a, 55a-65a.

does not allow one to practice medicine in the United States, nor is it designed to. Rather, all 50 states require completion of at least one year of a residency (commonly known as the internship year) in order to be licensed as a physician. *See* Federation of State Medical Boards, *State-specific Requirements for Initial Medical Licensure* (www.fsmb.org/usmle_eliinitial.html). These state laws consistently describe the required residency training as a period of graduate or post-graduate "education" or "training," not as prerequisite work experience.[5]

But merely being licensed is insufficient for the vast majority of physicians to independently and effectively practice their chosen specialties. For today's physicians, "licensure does not enable them to practice medicine in the specialty for which they are training and, therefore, is of no real significance." *Id.* Instead, 85% of doctors in the United States also find it necessary to become "board certified." ACGME, *Understanding the Difference Between Accreditation, Licensure and Certification* (www.acgme.org/acWebsite/RRC_140/140_20UnderstandingtheDifference.pdf). "Board certification has * * * 'come to be regarded as evidence of the skill and proficiency of those to whom they [have] been issued.'" *Peel* v. *Att'y Registration & Disciplinary*

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[5] *See, e.g.*, Ala. Code § 34-24-70(a)(2) ("post-graduate or residency training"); Conn. Gen. Stat. § 20-10 ("progressive graduate medical training as a resident physician"); Fla. Stat. § 458.311 ("medical education and postgraduate training requirements"); Idaho Code Ann. § 54-1803(c)(12) ("enrolled in a postgraduate medical training program"); Mich. Comp. Laws § 333.17031(1) ("postgraduate education to attain proficiency in the practice of the profession"); Okla. Stat. tit. 59, § 493.1(c) ("postgraduate medical training"); Tex. Occ. Code Ann. § 155.003(5) ("graduate medical training").

Comm'n of Ill., 496 U.S. 91, 102 n.11 (1990) (quoting American Board of Medical Specialties, *Evaluating the Skills of Medical Specialists* 1 (J. Lloyd & D. Langsley eds., 1983)). Board certification, in turn, generally requires completion of a full residency. *See, e.g.*, *Mizell* v. *United States*, 663 F.2d 772, 776 (8th Cir. 1981). As a result,

> [t]he vast majority of doctors simply cannot effectively practice and properly care for patients without completing their specialty as residents or fellows at a teaching hospital and becoming board-certified. Without being board-certified, doctors are not entitled to clinical hospital privileges and the opportunity to bill Medicare.

Mount Sinai, 2008 WL 2940669, at *2.

Medical school graduates are thus unlike their peers in other professions, such as the law. A residency is not simply the beginning of medical practice, akin to the work of a junior lawyer. It is one stop in the continuum of a physician's education that begins with medical school. At least a year of residency training is effectively a prerequisite for the practice of contemporary medicine. Unlike a lawyer who can complete law school, pass a bar exam, and hang out a shingle, physicians cannot simply pass an exam upon completion of medical school to commence independent practice of their profession. *See Ctr. for Family Med.*, 2008 WL 3245460, at *10. "If a physician wishes to practice medicine, she has little choice but to seek a residency position." Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 Geo. L. J. 1749, 1791 (1995). She applies to a residency "for an educational purpose," Pet. App. 38a n.8, because "[t]he ultimate

objective of residency programs is to ensure that the residents will acquire the knowledge base and the experience to manage the common problems in their specialty and function independently." *Mount Sinai*, 2008 WL 2940669, at *3.

2. The structure of residency programs, and the experience of medical residents, comport fully with the educational function of residencies. Allopathic medical residency programs are certified by the ACGME, and osteopathic residents can attend ACGME accredited-programs, or programs accredited by the AOA. ACGME has made it absolutely clear that "[r]esidents are first and foremost students, rather than employees, and all accreditation standards and activities reflect this distinction." ACGME, *Memorandum* (Mar. 1, 2000) (www.acgme.org/acWebsite/reviewComment/rev_residentEmployee.asp).[6]

To be accredited, a residency program must have "[r]egularly scheduled didactic sessions" and "[d]idactic and clinical education must have priority in the allotment of residents' time." ACGME, *Common Program Requirements*, §§ IV.A.3, VI.A.3 (2007) (www.acgme.org/acWebsite/dutyHours/dh_dutyhoursCommonPR07012007.pdf). Residency programs must "undergo regular internal and external review to ensure that they abide by and comply with" all of ACGME's curricula and

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[6] Osteopathic residency programs are accredited by the AOA's Council on Postdoctoral Training, which has similarly made clear that "[t]he purpose of Osteopathic Graduate Medical Education (OGME) is to provide quality educational programs with proper mentoring and supervision of all trainees." AOA, *Basic Documents for Postdoctoral Training* 9 (2010) (www.do-online.org/pdf/sir_postdoctrainproced.pdf).

institutional requirements. *Mount Sinai*, 2008 WL 2940669, at *7. This means that "[s]ponsoring institutions must provide services and develop systems to minimize the work of residents that is extraneous to their educational programs." *Id.* at *9. As petitioners have amply documented, ACGME accreditation carries with it a host of requirements that are intended to ensure that residents are continually engaged in activities that further their education. *See* Pet. Br. 5-8, 26-28. And Medicare funding depends on maintenance of that accreditation. *See* 42 C.F.R. §§ 413.75(b), 415.152 (Medicare provides funding only for medical residency programs accredited by ACGME or AOA).

In line with the purpose of a residency, the experience of residents is educational. Generally, a medical student must first apply to various residency programs through the National Resident Matching Program ("NRMP"), a process much like applying for college. *Mount Sinai*, 2008 WL 2940669, at *5 (application process viewed "in the same way [as] high school students, when applying to college"). Unlike with a job search, a prospective resident ranks various residency programs based on her preference for medical specialty and location. Clark, *supra*, at 1753. Residency programs, in turn, rank residents and submit those rankings to the NRMP. The process culminates on the anxious and unforgettable "match day," when she learns the institution that chose to accept her into its residency program. *Mount Sinai*, 2008 WL 2940669, at *5; Pet. App. 61a.[7]

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[7] Some osteopathic specialties require a first year called an "internship," in which students are "trainees." AOA, *Postdoctoral Training*, at 8. Certified trainees are "matched"

Our new resident knows from the outset that her time as a resident is finite. In most cases, it lasts only three to five years, depending on the specialty. NRMP, *About Residency* (www.nrmp.org/res_match/about_res/index.html). A medical school, hospital or a supporting organization (formed to coordinate training oversight) will be the "sponsoring institution" that is ultimately responsible for her education. ACGME, *Institutional Requirements*, § II.B.1 (2003) (www.acgme.org/acWebsite/irc/irc_IRCpr703.pdf); AOA, *Postdoctoral Training*, § IV.A. She must anticipate a job search in the years ahead, because there is generally no expectation of receiving a job with the sponsoring institution or affiliated hospital. *Mount Sinai*, 2008 WL 2940669, at *5 (aspiring resident "does not view the process to be one of picking his first 'job'" because he is "not likely to stay on staff as an attending physician after completion of the[ ] residency."); *Mayo I*, 282 F. Supp. 2d at 1001 n.8 ("when they began their residencies, they had no expectation of being hired by the [Mayo] Foundation as a staff physician upon completion of their programs").

Once her residency begins, our typical resident is assigned a faculty advisor to provide comprehensive educational advice and personal support. *Id.* at 1002. Residency programs follow a curriculum that is designed to provide residents with an educational foundation during the early years of their residency and an increased focus on their own specialty as they

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after this first year through the AOA Match program into a "residency" where they will train in a specialty. The AOA has adopted ACGME's core competency requirements, based on a "national consensus on what residents should know and be able to do," although the osteopathic competencies integrate osteopathic principles and practice. *Id.* at 9.

progress. Residents generally must follow a prescribed schedule that is developed by the specialty board under the aegis of the accrediting body. It is consistent for all residents in a given year of their specialty, though residents, like other students, have some choice regarding "electives." *See, e.g.*, ACGME, *Program Requirements for Graduate Medical Education in Child and Adolescent Psychiatry* 2 (2007) (www.acgme.org/acWebsite/downloads/RRC_progReq/405pr07012007.pdf). While a resident might undertake rotations at multiple participating hospitals or other institutions, her sponsoring institution holds ultimate responsibility for her education. ACGME, *Institutional Requirements*, § II.B.1 ("The Sponsoring Institution retains responsibility for the quality of [graduate medical education] even when resident education occurs in other institutions.").

The central feature of a residency is extensive clinical training that involves direct patient care. "[T]he principal classroom for residents must be the clinical setting because patient care in a medical specialty is what residents are receiving training for." *Mayo I*, 282 F. Supp. 2d at 1015. *See Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 507 (1994) ("Because participants learn both by treating patients and by observing other physicians do so, [graduate medical education] programs take place in a patient care unit (most often in a teaching hospital), rather than in a classroom."). The resident, however, always works under the "watchful eye" of faculty physicians. Pet. App. 64a; *Mayo I*, 282 F. Supp. 2d at 1018 ("a resident learn[s] by doing a medical task under the direct and personal guidance" of a faculty

member, who, "the whole time," is "looking over [the resident's] shoulder").

During "morning reports," our typical resident will discuss with faculty, other medical residents and medical students the diagnosis and management of patients in a ward. ACGME, *Core Competencies* (www.acgme.org/acWebsite/RRC_280/280_coreComp.asp). During "teaching rounds," she and other residents see patients and participate in diagnosis and treatment discussions, constantly under evaluation by faculty physicians who engage her and other residents in bedside exercises, drawing out and explaining salient educational points of each patient's condition. *Mayo I*, 282 F. Supp. 2d at 1003, 1016-17. The residents are providing care to patients, of course, but doing so is "inherent in the educational process," and because the goal is to make the resident capable of caring for patients "twenty-four hours a day and seven days a week, it is impossible to separate 'education' from 'patient care.'" *Id.* at 1014-15.

In addition to patient care activities, our typical resident must also keep a busy schedule of mandatory, integrated didactic education. Each rotation has a written curriculum, and residents participate in conferences and lectures throughout the week. Pet. App. 63a; *Mayo I*, 282 F. Supp. 2d at 1004. Over her three years or more, she will be required to participate in over 900 events, including core curriculum conferences, primary care conferences, grand rounds (a form of weekly lectures), morbidity and mortality conferences and journal clubs. *Mayo I*, 282 F. Supp. 2d at 1004; Pet. App. 41a n.10, 63a. That is approximately one formal didactic event per day, year-round, for three years.

And she finds herself continually mindful of the most emblematic part of student life: evaluation. She is evaluated by the faculty physicians supervising her rotations. *Mayo I*, 282 F. Supp. 2d at 1004; Pet. App. 63a-64a. She takes written tests, periodic program examinations, and national specialty board examinations. *Id.*; Pet. App. 22a. Residents who do not meet prescribed goals will not be promoted, and may be put on probation or dismissed. Pet. App. 64a n.17.

Finally, once our resident successfully completes her program, she graduates and receives a certificate that entitles her to take a certification exam of a medical board in her specialty. *Mount Sinai*, 2008 WL 2940669, at *2 n.4, 3; *Mayo I*, 282 F. Supp. 2d at 1004. She also is eligible to be fully licensed by the state where she will practice medicine. Only then does the next hurdle—finding a real job—await.

3. While the educational opportunities of the residency are rich, the funding for residents is comparatively modest. One does not enter a residency for the stipend, but "for successful completion of the program." *Davis* v. *Mann*, 882 F.2d 967, 974 (5th Cir. 1989); *see also Mayo I*, 282 F. Supp. 2d at 1017. Unlike many of her peers in other professions, who may earn large, competitive salaries upon receiving a professional degree, our resident receives a stipend calculated to maintain "a minimum standard of living." *Mount Sinai*, 2008 WL 2940669, at *6; Pet. App. 22a. The stipend for the average first year resident is approximately $45,000, significantly less than the post-residency market salary for a physician working independently in private practice. GAO, Report GAO-09-438R, at 4 (May 4, 2009) (www.gao.gov/new.items/d09438r.pdf)

(2008 figures); *Mount Sinai*, 2008 WL 2940669, at *34 (stipends "represent[] a far cry from the salaries drawn by fully trained and licensed physicians"); Pet. App. 17a. The stipend is not tied to the number of days or hours that she works, *Ctr. for Fam. Med.*, 2008 WL 3245460, at *10, and at any given institution is uniform within programs for all students during a given year of training, and across all specialties. *Mayo I*, 282 F. Supp. 2d at 1005.

Once licensed after completing at least one year of residency, our typical resident or her classmates might consider the frowned-upon practice of using scarce off-hours to "moonlight" in an emergency room to make some extra money. ACGME, *Policy on "Moonlighting" by GME Resident* (June 27, 2000) (www.acgme.org/acWebsite/GME_info/gme_PPmanual902.pdf) (moonlighting "clearly competes with the opportunity to achieve the full measure of the educational objectives of the residency"); AOA, *Postdoctoral Training*, § 7.H (prohibiting first-year moonlighting and requiring approval in other years). Were she to do so, she would learn that this experience differs sharply from her residency. Her work would be limited to repetitive treatment of low-priority, low-acuity problems such as earaches, sore throats and lacerations. *Mayo I*, 282 F. Supp. 2d at 1017. She would not benefit from the educational interaction with a faculty supervisor or other residents as she does during her residency time; she moonlights strictly "for the purpose of earning income." *Id.*

II. THE 40-HOUR RULE ARBITRARILY DENIES RESIDENTS "STUDENT" STATUS SIMPLY BECAUSE THEY RECEIVE TOO MUCH EDUCATION.

As shown above, and as courts that have considered the factual realities of residency programs have held, residents' activities are all part of an educational regimen and they are therefore students. But even though amici believe that every resident sponsored by accredited institutions should qualify for the FICA student exemption, that is not the question in this case. Rather, the question is whether the Treasury Department can categorically preclude all residents and their sponsoring institutions from even *attempting* to make that showing, merely because they spend more than a specified amount of time on those educational activities. The challenged regulations themselves expressly recognize that medical residencies "have an educational, instructional, or training aspect." 26 C.F.R. § 31.3121(b)(10)-2(e) (example 4). Yet, by administrative fiat, this fact "does not affect [the] conclusion" that residents are ineligible to claim the exemption merely because they devote more than 40 hours per week to their required activities. *Id.*

This categorical exclusion is invalid because it is contrary to the plain meaning of the statutory term "student," and is in any event arbitrary and capricious agency action. 5 U.S.C. § 706(2)(A). The regulations establish the perverse rule that residents can never qualify as students merely because they receive *too much* education. Someone receiving exactly the same kind of education as a resident, but spending only 39 hours per week on those activities, would be able to prove that he or she was a "student"

eligible for the exemption. But someone receiving even an hour more of that education—or, in the case of residents, twice as much—is categorically ineligible from even attempting to make that showing.

Words in a revenue act are interpreted in their "ordinary, everyday senses," *Comm'r* v. *Soliman*, 506 U.S. 168, 174 (1993), and the ordinary, everyday definition of a "student" is a person who engages in "study" by applying the mind "'to the acquisition of learning, whether by means of books, observation, or experiment.'" Pet. Br. 22 (quoting *Oxford Universal Dictionary* 2049-50 (3d ed. 1955)). Under that definition, a "student" does not cease to be one simply because she spends a large amount of time learning. The statute has no ambiguity on that point. Congress carefully limited the statute to "students" who are "enrolled and regularly attending classes" at a school, college or university, 26 U.S.C. § 3121(b)(10), but placed no limit on how much a "student" may "work" in order to claim the exemption.

Medical residents have a schedule that interweaves clinical training, centered on "rounds," with integrated didactic training such as conferences, lectures and research. Yet the regulations absolutely preclude them from ever being considered students merely because that education occurs in a "work" setting and exceeds a fixed, arbitrary number of hours set forth by bureaucratic decree. Even if it did not conflict with the statute, that is exactly the kind of "decisive but unreasoned" determination that is the very definition of arbitrary agency action. *See United States* v. *Carmack*, 329 U.S. 230, 243 n.14 (1946) ("arbitrary" means "'[f]ixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to

principles, circumstances, or significance[;] * * * decisive but unreasoned") (quoting *Webster's New International Dictionary* (2d ed. 1945)).

The 40-hour rule also devalues the medical profession's judgments about what is required to properly educate physicians. "Few professions require more careful preparation by one who seeks to enter it than that of medicine" because "[i]t has to deal with all those subtle and mysterious influences upon which health and life depend." *Dent* v. *West Virginia*, 129 U.S. 114, 122 (1889). And while "[e]very one may have occasion to consult [a doctor] * * * comparatively few can judge of the qualifications of learning and skill which he possesses." *Id.* It is the considered judgment of amici and others in the medical profession that residents require extensive clinical training before they can be fully certified to practice independently. That presently requires residents to devote up to 80 hours per week to their education, rather than the 39 or fewer that would qualify them as students under the regulations. ACGME, *Duty Hours Language* (www.acgme.org/acWebsite/dutyHours/dh_Lang703.pdf). The Secretary of the Treasury has expertise in financial areas, but he is plainly not one of the "comparatively few" people, *Dent*, 129 U.S. at 122, who is qualified to judge the number of hours of clinical education needed to ensure that physicians are fully qualified to practice independently. Nor has he even tried, instead establishing a categorical 40-hour rule regardless of circumstances.

In fact, when Congress has specifically considered the circumstances of medical residencies, it has concluded that residents are engaged in education rather than simply patient care. Medicare (and in

some states, Medicaid) provides substantial funds to residency programs for the direct and indirect costs of what Congress specifically described as "medical education." 42 U.S.C. § 1395ww(h); 42 U.S.C. § 1395ww(d)(5)(B); *see* 42 C.F.R. §§ 412.105, 413.75-83 (Medicare); Tim M. Henderson, *Medicaid Direct and Indirect Graduate Medical Education Payments: A 50-State Survey* (April 2010) (Medicaid). And when Medicare defines a resident for purposes of funding the graduate medical education program, it does so on the basis of the position (full time equivalent, or FTE) and area of the hospital where the resident trains, not on the number of hours spent in training. *See* 42 C.F.R. § 413.78.

"Congress was concerned that teaching hospitals would incur greater costs in treating patients than would non-teaching hospitals." *Rhode Island Hosp.* v. *Leavitt*, 548 F.3d 29, 32 (1st Cir. 2008). The costs are higher because, among other reasons, "the mere presence of interns and residents in an institution puts extra demands on other staff and leads to the existence of higher staffing levels" and "[t]he process of graduate medical education results in very intensive treatment regimens." Department of Health & Human Services, *Hospital Prospective Payment for Medicare: A Report to Congress* 49 (1982). The group of residents accompanying a faculty member on rounds is not necessary for patient care, but it is necessary for their education. And that educational component is inextricably intertwined with everything residents do. Thus, contrary to the Treasury Department's arbitrary rule, Congress has recognized that medical residents are not merely ordinary "full-time employees," 26 C.F.R.

§ 31.3121(b)(10)-2(d)(3)(iii), but rather are real students engaged in educational activities.

The IRS itself has effectively admitted that, but for its 40-hour rule, medical residents can and do qualify for the FICA student exemption when their actual circumstances are allowed to be considered. On March 2, 2010, the agency announced that it would refund FICA taxes to all residents and teaching hospitals who had filed claims for refunds of FICA taxes before April 1, 2005, the effective date of the regulations at issue here. *See* I.R.S. News Release IR-2010-25 (Mar. 2, 2010) (www.irs.gov/pub/irs-tege/nr-2010_25.pdf); Opp. Cert. 14 n.2. This determination covered all existing claims throughout the country, not merely those of specific parties who had prevailed in court. Because the IRS is always bound by the governing statute, it could not have paid those refunds unless the statute allowed residents to qualify as students.

The statute has not been amended, yet the agency now persists in denying all subsequent claims solely on the authority of its blanket 40-hour rule. The only thing that has changed is the IRS's interpretation, which the agency is seeking to impose without providing justification. That discrepancy shows that the rule conflicts with the statute. The same residents and sponsors who have proven their compliance with the statute when given a chance to present their specific circumstances are now arbitrarily prevented from doing so.

III. THE 40-HOUR RULE THREATENS TO IMPAIR ACCESS TO MEDICAL EDUCATION AND THE PROVISION OF MEDICAL SERVICES.

The arbitrary 40-hour rule may threaten the massive and urgent efforts to educate the next generation of physicians and meet the nation's healthcare needs. There are nearly 8,500 accredited residency programs in the U.S., providing education to over 107,000 residents. ACGME, *The ACGME's Approach to Limit Resident Duty Hours 2007-08* (www.acgme.org/acWebsite/dutyHours/dh_achievesum0708.pdf). Whether or not they could qualify for Congress's student exemption if given the chance, the IRS intends to tax every one of them. According to the government, these taxes amount to $700 million dollars every year. Pet. 20. These additional, unwarranted taxes imposed directly on education may have an impact on a resident's choice about what specialty to pursue, and the ability of the institutions that sponsor residency programs to provide that education.

FICA is a tax that hits medical residents particularly hard, given their extreme debt loads. The average medical school graduate has around $155,000 in educational debt. GAO, *supra*, at 4 (2008 data). The average stipend for a first year resident is about $3,729 per month, but monthly loan payments can reach over $1,700 per month, or about 48% of pre-tax income, subject to a limited number of partial loan deferral options. *Id.*[8] Under 2010 rates,

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[8] Even if all of a resident's debt is fully eligible for the federal graduated repayment plan, the resident still must spend about 10% of the stipend on student loan payments. *Id.*

about 7.65% of a resident's educational stipend—nearly 15% of an average resident's remaining income—must go to pay FICA taxes under the challenged regulations, and this is on top of federal, state and local income taxes. Social Security Administration, *Social Security & Medicare Tax Rates* (www.ssa.gov/OACT/ProgData/taxRates.html).

These significant costs may, at the margins, affect a resident's choices about what medical specialty to pursue. Facing mounting financial obligations, she may choose a more highly compensated specialty such as surgery, even if it is not otherwise a suitable fit or the specialty of her keenest interest. Or she may choose a practice with a shorter residency, at the expense of a specialization in which she would thrive and excel, for the sake of relieving financial pressures.

Teaching hospitals, medical schools and other sponsoring organizations are also vulnerable, as they must match FICA contributions. As a matter of simple math, hundreds of millions of dollars that must be paid in taxes every year represents hundreds of millions of dollars that cannot be spent on medical education or any of the other beneficial activities in which these educational institutions are engaged.

The long hours required for residency training have received intensive study in recent years, and yielded recommendations by ACGME and AOA that a reduction of in the number of hours of training and tasks can both increase the quality of residents' education and reduce medical errors. Many changes have already been made in this regard, including ACGME's recommendation of an 80-hour week in 2003. *See supra* at 21. But these changes and others

have required either increasing the number of fully trained physicians or expanding nursing staff, or enlarging the resident programs themselves, amounting to over $1.6 billion in additional costs. Teryl K. Nuckols, et al., *Cost Implications of Reduced Work Hours and Workloads for Resident Physicians*, 360 New Engl. J. Med. 2202 (2009) (changes needed to implement 80-hour limits estimated to cost each major teaching hospital about $3.2 million annually). The continuing imposition of $700 million of FICA taxes on institutions that sponsor residency programs and on residents can only slow the pace of reform by siphoning more resources from the education of residents.

Finally, these unwarranted taxes come at a time when there is a national doctor shortage—particularly in primary care—which will only be exacerbated by Congress's recent efforts to expand basic health-care coverage. The overall demand for physician services will increase an estimated 22% between 2005 and 2020, while the number of primary care physicians will increase by only 18% during this period. Darrell G. Kirch, *How To Fix The Doctor Shortage*, Wall St. J., Jan. 5, 2010, at A17. At current graduation and training rates, the nation could face a shortage of as many as 150,000 doctors in the next 15 years. Suzanne Sataline & Shirley S. Wang, *Medical Schools Can't Keep Up*, Wall St. J., Apr. 12, 2010, at A3. But the medical education timetable is at odds with the timetable for healthcare reform. Even if applications to medical schools rise, a bottleneck at the medical residency education stage is likely if there is not a corresponding expansion of residency positions. *Id.* Imposing an additional $700 million in taxes on residents and their schools may

decrease the ability of amici's members to meet those critical needs.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
AUG 13 2010
OFFICE OF THE CLERK

No. 09-837

In the Supreme Court of the United States

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF BJC HEALTHCARE, CAPITAL AREA HEALTH CONSORTIUM, INC., HENRY FORD HEALTH SYSTEM, MEMORIAL SLOAN-KETTERING CANCER CENTER, AND OREGON HEALTH & SCIENCE UNIVERSITY AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, BJC HealthCare, Capital Area Health Consortium, Inc., Henry Ford Health System, Memorial Sloan-Kettering Cancer Center, and Oregon Health & Science University submit this *amici curiae* brief in support of Petitioners Mayo Foundation for Medical Education and Research, *et al.*[1] *Amici* are each sponsors of graduate medical education programs and, thus, are keenly interested in supporting and safeguarding one of the educational missions of teaching hospitals in this country– the completion of the formal education of medical residents and fellows.

BJC HealthCare ("BJC") is a Missouri not-for-profit corporation comprised of thirteen member hospitals in and around St. Louis, Missouri. Barnes-Jewish Hospital ("BJH") and St. Louis Children's Hospital ("SLCH") are BJC's academic hospitals, affiliated with Washington University School of Medicine. BJH is consistently ranked on the US News and World Report Honor Roll and SLCH is one of the top five Children's Hospitals in the country. The Siteman Cancer Center at Barnes-Jewish Hospital has been designated a National Cancer Institute

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[1] *Amici* confirm that (i) no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief, (ii) no counsel for any party authored any part of this brief, and (iii) no party or counsel contributed money intended to fund the preparation or submission of this brief. Petitioners have filed a blanket waiver consenting to the filing of *amicus* briefs, and *amici* secured specific written consent from the respondent.

comprehensive cancer center. BJH and SLCH together sponsor 95 programs, 80 of which are accredited by the American Council on Graduate Medical Education. These programs cover a broad spectrum of medical and surgical specialties and subspecialties educating more than 1100 residents and fellows annually. All BJH and SLCH Medical Staff Members and teaching physicians have faculty appointments at Washington University School of Medicine.

The Capital Area Health Consortium ("CAHC") is a voluntary association of several Connecticut hospitals: the Connecticut Children's Medical Center, Hartford Hospital, the Hospital For Special Care, the Hospital of Central Connecticut, St. Francis Hospital & Medical Center, the John Dempsey Hospital/UConn Health Center – School of Medicine, and the VA Connecticut Healthcare System. Through the University of Connecticut School of Medicine, CAHC supports 50 fully accredited residency and fellowship programs, educating nearly 600 residents and fellows each year. Teaching faculty all hold appointments at the University of Connecticut School of Medicine.

Henry Ford Health System ("HFHS") is a Michigan not-for-profit corporation and one of the premier integrated health care delivery systems in the country. Through its member hospitals and 30 ambulatory centers, located in and around Detroit, Michigan, HFHS honors its educational mission through the offering of nearly 50 fully accredited residency and fellowship programs, educating almost 600 residents and fellows each academic year. Teaching faculty are employed by the Henry Ford Medical

group—founded in 1915 after consultations with physicians at Johns Hopkins Hospital and the Mayo Clinic.

Memorial Sloan-Kettering Cancer Center ("MSKCC") is a New York not-for-profit corporation comprised of three entities: Memorial Hospital for Cancer and Allied Diseases, Sloan-Kettering Institute for Cancer Research, and Memorial Sloan-Kettering Cancer Center. Collectively, these entities comprise the nation's leading cancer center. In fulfilling its commitment to medical education, MSKCC sponsors world-renowned residency and fellowship programs in most of the recognized specialties and subspecialties of cancer medicine. MSKCC is a major teaching affiliate of Weill Medical College of Cornell University, and all of its staff physicians are on the Weill Medical College's faculty. In 2009, the United States Court of Appeals for the Second Circuit ruled, in MSKCC's favor, that FICA's Student Exception unambiguously does not exclude medical residents from coverage. *See United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19 (2d Cir. 2009).

Oregon Health & Science University ("OHSU") is the state of Oregon's only academic health and research university. OHSU brings together patient care, research, education of the next generation of health care providers, and scientists and community service to improve the health and well-being of all Oregonians. The university continually assesses healthcare shortages in every region of the state. Based on those assessments, OHSU develops curricula and policies designed to improve the geographic

distribution of healthcare professionals in Oregon. OHSU's graduate medical education programs, in particular, educate nearly 700 residents and fellows each year across 71 programs accredited by the Accreditation Council for Graduate Medical Education. Graduate medical education teaching faculty all hold appointments with the university.

SUMMARY OF ARGUMENT

Graduation from an undergraduate medical school, though sufficient to confer an M.D. or parallel degree, does not allow aspiring physicians to practice medicine. Instead, they must continue their education through a teaching hospital's residency program, in which they are supervised by a faculty of fully-trained, Board-certified, attending physicians who serve as the residents' teachers.

Given the educational nature of residency programs, several circuit courts have correctly recognized that medical residents and their employers are not required to pay FICA taxes. Since 1939, FICA has included a Student Exception that—like the other exceptions listed under Internal Revenue Code § 3121(b)—supersedes the normal rule that payments for services rendered are subject to FICA. Specifically, under the Student Exception, payments for "service[s] performed in the employ of a school, college, or university" are not subject to FICA taxes if they are paid to any "student who is enrolled and regularly attending classes at such school, college, or university." *See* 26 U.S.C. § 3121(b)(10). As the Eleventh Circuit explained, this unambiguous statute is broad enough to encompass the services rendered by medical residents, because it "does not limit the types of services that qualify for the exemption." *United States v. Mount Sinai Medical Ctr. of Fla., Inc.*, 486 F.3d 1248, 1251–1256 (11th Cir. 2007). Such holdings reflect the reality of the residency system—residents are students, learning how to prac-

tice medicine from their teachers, the attending physicians.[2]

In 2004, the Treasury Department set out to defy both this law and common sense. Through promulgation of a new regulation, an amendment of Treasury Regulation § 31.3121(b), the Department asserted that services performed by a "full-time employee" should no longer be protected by the statutory Student Exception, notwithstanding any "educational, instructional, or training aspect[s]" of such work—a change that serves to exclude medical residents from the scope of the exception. But this new regulation cannot change the plain text of the statute, nor does its promulgation somehow alter the factual realities of modern medical education. As courts have analyzed and applied the Student Exception in recent years, they have been guided by their factual understanding of graduate medical education[3]—what

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[2] As has been the convention in these cases, this brief uses the term "resident" to refer generally to all students in graduate medical education programs, including "interns" (a term used in years past, but with less frequency today, to refer to residents in their first year of a residency program) and "fellows" (in some medical specialties, a resident who has completed several years of residency but is pursuing additional education in order to practice in a subspecialty). *See, e.g.*, *United States v. Mount Sinai Medical Ctr. of Fla., Inc.*, No. 02-cv-22715, 2008 U.S. Dist. LEXIS 57808, at *2 n.1 (S.D. Fla. July 28, 2008).

[3] "Graduate medical education" is the accepted term for the phase of formal education that commences upon the completion of undergraduate medical school (and the conferral of a degree, such as M.D., D.O., or D.D.S.). Residency and fellowship training programs are overseen generally by a "GME" office or committee, including a faculty attending physician serving as direc-

it is, why it matters, and how it works in practice. This background remains just as relevant under the new regulation. Neither graduate medical education nor the statutory Student Exception has changed since these cases were decided. As a result, it is important for this Court to understand graduate medical education in detail.

Through this brief, *amici* aspire to share with this Court the benefit of that understanding. Any serious investigation of residency programs establishes that they are fundamentally educational in nature. In these programs, attending physicians serve as teachers, training future generations of physicians in the art of patient care. Thus, both systemically and culturally, medical residents are "students" in any relevant sense of the word—a fact recognized by every circuit court to consider the question prior to the decision now before this Court.

The Eighth Circuit's decision below therefore cannot stand. The 2004 Treasury Regulation contradicts not only the statutory text of FICA's Student Exception, but also the common-sense understanding of anyone involved in the residency process—demonstrating the fundamental disconnect between the government's claims and the realities of the modern medical education system. As a result, the new regulation is not entitled to *Chevron* deference, and must be invalidated.

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tor or dean. *See Mount Sinai*, 2008 U.S. Dist. LEXIS 57808, at *2 n.1, 10, 37–38.

ARGUMENT

I. Residencies Are A Central Part Of The Medical Education Process.

A. Aspiring Physicians Must Complete A Residency Before They Can Independently Practice Medicine.

In the modern world of medicine, physicians may not effectively practice in their chosen specialties without first crossing two critical thresholds: they must be certified by a medical board in their intended areas of practice, and they must secure access to privileges at a hospital. *See, e.g., United States v. Mount Sinai Medical Ctr. of Fla., Inc.*, No. 02-cv-22715, 2008 U.S. Dist. LEXIS 57808, at *10 -12 (S.D. Fla. July 28, 2008).

The first of these benchmarks—board certification—denotes a physician's substantive qualifications as a medical practitioner. A number of medical organizations, united by a common goal of ensuring the professional competency of practicing physicians, are responsible for establishing the standards for certification in a wide array of medical specialties and subspecialties. *Id.* at 11.[4] These standards form the basis of board examinations administered by each organization, through which physicians demon-

[4] For example, the American Board of Internal Medicine, the certifying body for internal medicine, establishes both the standards for certification as an internist and the standards for certification in all internal medicine subspecialties, such as cardiology or hematology. *Mount Sinai*, 2008 U.S. Dist. LEXIS 57808, at *11-12

strate their qualification to practice. Just as lawyers must pass the bar before practicing law, physicians cannot practice medicine in a specialty or subspecialty without first receiving board certification in that specialty or subspecialty. *See id.* at *11–12.

The second benchmark—access to "privileges" at a hospital—controls a physician's practical ability to provide patient care. Without hospital privileges, a physician may not admit patients to a given hospital for medical or surgical care. As a result, possession of hospital privileges—or absence thereof—dictates the scope of care that a physician can provide, and complete care is not possible without hospital access. *See id.* at *11.

These two criteria, the basis of modern medical practice, can *only* be achieved by first completing a licensed residency program at a teaching hospital. *Id.* at *10. Undergraduate medical education grants an aspiring physician an M.D. or equivalent terminal medical degree, but no more. *Id.* at *2 n.1. Completion of a residency is a mandatory prerequisite to be eligible to sit for a medical board. Indeed, even a board-certified physician must complete additional "fellowship" residency training before being eligible to sit for a subspecialty board. *Id.* at *10–11. Likewise, a physician cannot secure hospital privileges without first completing a residency and becoming board-certified. The most physicians can do prior to completing a residency is obtain their state licensure—a necessary step for them to continue their residency education, in most cases, but beyond that one that "does not enable them to practice medicine in the specialty for which they are training and,

therefore, is of no real significance." *Id.* at *12–13 n.6. And even this limited license can only be secured after completion of at least the first year of a post-graduate residency. *Id.*

The centrality of this residency requirement may appear to conflict with the historic concept of recent medical school graduates serving as "general practitioners"—an image of medical education that many may still retain, in error. It is certainly true that, in the early twentieth century, many doctors completed only a one-year internship after graduating medical school and then began a generalized practice of medicine. But the general practitioner model is dead and has been since the 1970s. *Id.* As medicine has grown more complex over time, so too has the training and certification necessary to practice it safely. Today, the term lives on only as a misnomer wrongly applied to practitioners of family medicine—a specialty like any other medical specialty, and one that requires a residency in order to practice. *Id.*

In sum, the residency requirement has developed, over time, into the cornerstone of the medical educational process. Even though a physician's residency follows his or her receipt of an undergraduate medical degree, completion of the graduate medical education curriculum for a residency program nevertheless is a necessary precondition before a physician can effectively and independently practice medicine.

B. Residency Programs Teach Residents How To Care For Actual Patients.

1. As the Southern District of Florida aptly observed, "[a] residency program is an extension of a medical resident's formal education." *Id.* at *15-16. At every stage, the residency program is structured like traditional medical education and designed to advance pedagogical goals.

At the onset, medical school graduates apply for residency programs based upon their academic records and career goals, evaluating potential residencies the same way rising undergraduates evaluate colleges. *Id.* at *19. Aspiring residents submit their applications to a national "matching" system that pairs hospitals with compatible students. *Id.* at *18-19. Thus, the application process closely mirrors traditional collegiate applications. *Id.* at *20.

Once accepted, the residents develop through programs designed to continue their educational growth by teaching them how to translate academic knowledge into practical expertise. This process actually begins during medical school, where third- and fourth-year undergraduate students begin interacting with actual patients during hospital "rounds." Indeed, the line between residency and undergraduate education is initially almost nonexistent, as undergraduate students regularly "round" with residents and fellows, under the supervision of a common attending physician. *Mount Sinai*, No. 02-civ-

22715 (S.D. Fla), Dkt. 188 ("Katz Test.") at 184.[5] Over time, residents continue through a "quite analogous" pattern of patient exposure, through which the residents progressively gain additional responsibilities and experiences. *Mount Sinai*, 2008 U.S. Dist. LEXIS 57808, at *17. For residents, "the bedside [is] the predominant classroom." *Id.* at *73.

But residents do not solely learn their future trade by assisting with patient care. As part of their education, residents are required to engage in a number of more stereotypically "academic" tasks. *Id.* at *28. They are assigned textbook reading, and quizzed upon it. They are required to attend scholarly conferences and lectures. Weinberg Test. at 128; *United States v. Memorial Sloan-Kettering Cancer Center*, No. 06-cv-0026 (S.D.N.Y.), Dkt. 28 ("Massie Decl.") at ¶17.[6] And they are tested after

---

[5] Dr. Paul Katz, Mount Sinai Medical Center's former vice-president for academic and research affairs, testified in the *Mount Sinai* trial regarding the nature of residency programs. Also testifying were Dr. Gloria Weinberg, chairman of the Department of Medicine at Mount Sinai (Dkt. 190, "Weinberg Test"), Dr. Thomas Mesko, an attending physician at Mount Sinai (Dkt. 188, "Mesko Test"), and Dr. David Lang, Mount Sinai's chief of emergency medicine (Dkt. 191, "Lang Test"). Their testimony was repeatedly credited by the trial court. *See generally* 2008 U.S. Dist. LEXIS 57808.

[6] Dr. Mary Jane Massie practices at Memorial Sloan-Kettering Cancer Center, where she is both an attending physician and the Chairman of Memorial's Graduate Medical Education Committee. She submitted a sworn declaration to the Southern District of New York in the case in which the Second Circuit ultimately held that the FICA Student Exception unambiguously does not exclude medical residents. *See* 563 F.3d 19, 27 (2d Cir. 2009).

each rotation, with these tests forming the basis of a yearly determination of whether the resident should advance to the next educational year. Katz Test. at 47.

This educational content is not left to the discretion of the teaching hospitals. Rather, organizations like the Accreditation Council for Graduate Medical Education ("ACGME"), an association of several constituent medical organizations, dictate requirements governing both residency programs themselves and the institutions that sponsor them. *See generally Mount Sinai*, 2008 U.S. Dist. LEXIS 57808, at *23–32; Katz Test. at 14–15. The ACGME then regularly monitors institutional compliance with these requirements, to ensure that residents receive a consistent level of education. *Mount Sinai*, 2008 U.S. Dist. LEXIS 57808, at *23–32.

These accreditation standards require that "the educational goals of the residency program and learning objectives of the residents must not be compromised by excessive reliance on residents to fulfill institutional service obligations." *Id.* at *28–29. As a result, throughout the residency process, the program's focus is on educating the residents, not merely on providing patient care. *Id.* at *84 (quoting testimony of Dr. Katz). The rotation model ensures that residents are directed towards the educational opportunities that they need to develop their skills, rather than merely towards whatever medical needs are present in the hospital at a given time. *Id.* at 31–32; *United States v. Memorial Sloan-Kettering Cancer Center*, No. 06-cv-0026 (S.D.N.Y), Dkt. 27

("Dougherty Decl.") at ¶22.[7] Likewise, non-educational ancillary procedures are performed by non-residents, to ensure that residents maintain their educational focus. *Mount Sinai*, 2008 U.S. Dist. LEXIS 57808, at *48–49. Education, not patient service, remains the touchstone.

The accreditation process also dictates the nature of the wages paid to residents by their employer hospitals. The ACGME requires sponsoring institutions to provide all residents with appropriate financial support to cover living expenses—but these payments are not a competitive wage or bargained-for compensation. *See id.* at *8, *34. As with all other elements of the residency program, the focus is upon providing for the education of the students, not upon compensating them for the services they provide to patients.

In the end, hospitals must be able to establish and certify that their residents are capable of the independent practice of medicine. Katz Test. at 51. Over the span of a several-year residency program, medical students are given the opportunity to learn how to take the academic knowledge they developed as undergraduates and apply it to the actual care of patients. The nature, structure, and purpose of residency programs prove that they are inescapably educational.

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[7] Dr. James B. Dougherty, formerly Deputy Physician-in-Chief at Memorial Sloan-Kettering Cancer Center, also submitted a sworn declaration to the Southern District of New York in the *Memorial Sloan-Kettering* case.

II. Within The Residency System, Attending Physicians Serve As Teachers, With Residents As Their Students.

With the educational nature of residency programs established, it becomes easier to understand the role residents play within that framework. The point is clearest through contrast: the many ways that attending physicians serve as teachers, and the resulting culture that shows that residents are their students—not their fellow employees.

A. Medical Residencies Establish A Teacher/Student Relationship Between Attending Physicians And Their Residents.

1. At every stage in the process, the residency system prioritizes the attending physicians' role as teachers, as well as caregivers.

First, hospitals recruiting attending physicians specifically focus upon their educational qualifications, in addition to their professional skills. *Mount Sinai*, 2008 U.S. Dist. LEXIS 57808, at *14–15; Mesko Test. at 202 (scholarly activities of potential attending physicians are reviewed as part of the hiring process). Conversely, many attending physicians are drawn to working in teaching hospitals due to their interest in being involved in the educational process. *Id.* at *54–55; Lang Test. at 66 ("Number one, we enjoy the teaching, we enjoy the education, and we think it's important."). Indeed, in many cases, this results in attending physicians' employment overlapping with a faculty appointment at a university affiliated with the hiring hospital. Massie

Decl. at ¶¶4, 7; Dougherty Decl. at ¶12; Katz Test. at 139.

This focus remains central throughout an attending physician's employment—even strong practitioners cannot remain attending physicians if their educational work is not equally solid. As Dr. Weinberg, Mount Sinai's chairman of the Department of Medicine, explained to the Southern District of Florida, "the quality of education is largely dependent on the quality of the teaching. So, if there is an attending who may be an excellent attending medically, but is just not a good teacher, that person is not appropriate." Weinberg Test. at 141. Meanwhile, attending physicians are expected to remain active in medical scholarship during their tenure at a teaching hospital—they cannot merely practice medicine. Katz Test. at 110–111; Weinberg Test. at 135.

Attending physicians view their commitment to teaching as a primary aspect of their professional goals and their missions are physician/educators. Massie Decl. at ¶15. The residency framework is built upon this commitment. As a result, attending physicians are responsible for a vast array of traditionally "academic" or "educational" tasks:

- As part of the accreditation process for ACGME programs, faculty attending physicians are responsible for creating a complex program information form, or "PIF." The PIF serves as a blend of curriculum and lesson plan, analogous to academic plans ordinarily created by teachers. Katz Test. at 28. Creation of a PIF is a mammoth undertaking, but it is an essential part of the academic process, as it demonstrates to the accredit-

ing agency both the substance of the residency program and the manner in which the program will ensure that residents are taught that content. Lang Test. at 65–66.

- The PIF in turn forms the basis of resident education, as program directors work to ensure that residents' rotations accord with the ACGME's requirements and the PIF. For example, as Dr. Weinberg explained, "for each experience that a resident has, we have to make sure that there is a written curriculum and that written curriculum is essentially put together by me with the person, if applicable, who is responsible for that subspecialty and has a syllabus as well. And it is looking to make sure that we are updating this frequently so we're teaching residents up-to-date material, and it is ensuring that both the faculty and the residents participate in the creation and updating of the curriculum on a regular basis." Weinberg Test. at 114.

- The core of this educational process is the rounds, in which attending physicians teach groups of residents how to care for patients. Rounds take many forms, ranging from "more academic . . . classroom like" lectures—where attending physicians teach residents about the physiology of medicine, as well as immersing them in patient care—to more-accelerated "management" rounds, where residents shadow attending physicians during their reviews of their patients. Weinberg Test. at 119–120. In each, attending physicians take time to teach their residents by explaining to them how to interpret and respond to the pa-

tient's medical issues, over time entrusting the residents with more and more responsibility over the patient's care. Weinberg Test. at 119.

- In addition to conventional rounds, attending physicians also oversee series of educational conferences and journal clubs, in which residents are required to learn by discussing assigned readings or other educational materials. Mesko Test. at 210–211. Again, these classes form a required part of a resident's academic curriculum, and are taught by the attending physicians.

- Finally, attending physicians are responsible for testing and grading their residents. Mesko Test. at 211. In the most critical of these, attending physicians administer, grade, and review yearly tests to determine whether the residents should be graduated to the next educational year of their program. Mesko Test. at 211, Katz Test. at 49. These major tests are supplemented throughout the year by smaller tests and quizzes, both oral and written, which help the attending physicians judge their residents' growth. Katz Test. at 141–143.

There is nothing unique about these educational tasks. Creating lesson plans, teaching classes, and administering tests are the heartland of a teacher's job—and are the job attending physicians are hired to perform.

2. This educational role is reinforced by the relationship between attending physicians, residents, and the patients for whom they care.

Although residency programs are designed to give residents meaningful experiences in providing patient care, it is undisputed that attending physicians, not residents, "own" their patients. Residents do not have ultimate responsibility for any patients under the hospital's care—nor could they, as they are not yet certified to practice medicine. Even in circumstances where a resident has received his or her license under state law, the resident cannot take ownership over the patients whose care they assist with as part of their residency. *Mount Sinai*, 2008 U.S. Dist. LEXIS 57808, at*54-55; Massie Decl. at ¶13; Dougherty Decl. at ¶18.

Rather, the residency program is designed such that attending physicians care for their patients, while involving residents in the process where pedagogically appropriate and medically safe. Even as limited responsibilities are delegated to residents, the attending physician's control over this process is absolute:

> The role of the attending is a constant in the sense that the attending is always the responsible physician. Patients are admitted under attendings and the attending faculty is ultimately responsible for the patients. They are responsible for seeing the patient, examining the patient, for writing a note.
>
> But this time, if they have interns and residents working with them, they are responsible not only for doing the care by themselves, but for making sure that the residents are learning how to care for the patient. So, an intern would go down, if it is a simple case,

> the resident may let the intern see the patient alone, come back, report to them. The resident would go in, report the findings and teach the intern how perhaps the resident's findings differed. Then the attending would then discuss the case and say how their findings differed and then they all decide on a plan together.
>
> Very often, as the year goes by, I will say to the intern "pretend I am not here, write all of your orders" and then go through them, correct them, sometimes rewrite all of them before they are entered. However, if I have a patient in shock, I'm not letting an intern go in first and a resident go in second. I am there with them at that time because time is critical and it's a more urgent situation.
>
> So, it's permitting progressive responsibility through the years in a training setting, but understanding that who is capable of what at what level. In some ways it is more difficult

Weinberg Test. at 122–123. Thus, teaching hospitals employ a series of procedures to ensure that all patient care provided by residents is properly supervised and circumscribed by attending physicians, limiting resident involvement to educationally-appropriate assistance. Massie Decl. at ¶¶12–14, Dougherty Decl. at ¶18. Even patient care exigencies are not permitted to interfere with this educational model. For example, emergency departments are ordinarily staffed with sufficient coverage so that they can run without residents—ensuring that residents remain focused on their curriculum-mandated

courses of learning rather than being forced to respond to patient-care crises. Lang Test. at 64-65. As a result, even though residents do provide valuable services to hospital patients, it is *always* within the rubric of an educational experience administered and shaped by their teachers—the attending physicians.

That said, the pedagogical nature of graduate medical education invariably renders the resulting patient care less efficient—a tradeoff accepted only because of the educational value it provides. The time attending physicians devote to their teaching obligations could be directed exclusively towards patient care. Without question, diagnosis and treatment would go faster if the attending physicians were working alone. Weinberg Test. at 119, Mesko Test. at 220. These inefficiencies are in turn reflected in the compensation hospitals receive for resident "work." As a rule, patients do not pay for treatment performed by a resident, and in some cases patients refuse treatment from residents altogether. Massie Decl. at ¶15, Dougherty Decl. at ¶21. Instead, Medicare partially subsidizes hospitals for the losses they incur by supporting the educational value of residency programs, but this subsidy stops well short of covering the complete cost. *Mount Sinai*, 2008 U.S. Dist. LEXIS 57808, at *14.

Every aspect of the relationship between attending physicians, residents, and patients reinforces a common truth—in the system of graduate medical education, attending physicians are teachers, sacrificing some of their time and talents to educate residents, the next generation of medical practitioners.

B. The Residency Systems Creates An Academic Culture In Which All Involved View Residents As Students.

Even though they nominally work together, attending physicians and residents are at drastically different stages of their career. Attending physicians are already fully competent, specialized practitioners, hired to serve as both educator and caregiver. Massie Decl. at ¶11. Having already completed their residencies, they are board-certified and have full access to the hospital privileges that residents lack. *Mount Sinai*, 2008 U.S. Dist. LEXIS 57808, at *38. Residents, on the other hand, are not yet qualified to practice—the whole point of the residency is for them to *become* qualified. Indeed, even though residents provide patient care (under supervision) as part of their residency, they have no expectation of employment by their teaching hospital. In the culture of medical practice, securing a residency is viewed like a school admission, not a first job. *Mount Sinai*, 2008 U.S. Dist. LEXIS 57808, at *19, 111; Massie Decl. at ¶11.

To everyone involved in the process, the perception is that attending physicians are teachers and residents are their students. In many cases, attending physicians are actually called "faculty." *Mount Sinai*, 2008 U.S. Dist. LEXIS 57808, at *38; Weinberg Test. at 93. They regularly refer to residents as "students," just as they did not view themselves as doctors until after they had completed their residencies. Massie Decl. at ¶9. By contrast, first-year residents often are taught during rounds alongside third- and fourth-year undergraduate students,

reinforcing the gap between them and the attending physicians who oversee their education. Katz Test. at 184. Attending physicians view themselves as constantly teaching; residents view themselves as gaining the final stage of their education. Dougherty Decl. at ¶21; *Mount Sinai*, 2008 U.S. Dist. LEXIS 57808, at *111–112.

III. As Both The Statutory And Common-Sense Definitions Of "Student" Include Medical Residents, The 2004 Treasury Regulation Is Invalid.

The heart of Petitioners' case is their challenge to the 2004 Treasury Regulation, which created the "full-time employee" rule that purportedly excludes medical residents from coverage under FICA's Student Exception. The Eighth Circuit concluded that, under the familiar analysis articulated by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the new Treasury Regulation is a "reasonabl[e]" construction of the statutory exemption, and therefore entitled to deference. *See* Pet. App. 10a–12a.

Petitioners have already demonstrated the Eighth Circuit's legal error. Under ordinary standards of *Chevron* review, courts evaluating the validity of an agency's interpretive regulation must first determine whether Congress has spoken to the relevant issue and, then, only defer to a reasonable agency interpretation in cases where Congress's legislation is ambiguous. *Chevron*, 467 U.S. at 842. Here, four circuits—the Second, Sixth, Seventh, and Eleventh—have correctly recognized that FICA's Student Exception is *not* ambiguous, and that, under

the statute's plain language, medical residents are *not* categorically barred from claiming the exemption. *See United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27 (2d Cir. 2009) (holding that Student Exemption "is not ambiguous" and that applicability to medical residents is "a question of fact, not a question of law"); *United States v. Detroit Med. Ctr.*, 557 F.3d 412, 417–418 (6th Cir. 2009) (rejecting government argument that "as a per se matter a resident can never be a student"); *Univ. of Chicago Hosps. v. United States*, 545 F.3d 564, 567 (7th Cir. 2008) (Student Exemption is unambiguous; "The interpretation the government advances—that the student exception is categorically inapplicable to residents—is textually untenable"); *Mount Sinai*, 486 F.3d at 1252 ("By its plain terms, the student exemption does not limit the types of services that qualify for the exemption."). The government has no authority to promulgate a regulation that contradicts the statute's plain command: it cannot define "student" in a way that categorically excludes residents when residents are covered by the unambiguous statutory text.

But the failings of the Treasury Department's new regulation are made clearer by the historical, logistical, and cultural details discussed above—medical residents are "students" in any meaningful or colloquial way. This is not a case in which the government, in an effort to make sense of an unclear statute, adopts a reasonable regulation that reflects and respects common sense. Rather, the government's actions here are fundamentally out of step, not only with the governing law, but also with the medical world at large. Upholding the unfounded

new regulation would directly contradict the ordinary understanding of the nature of residency programs. Invalidating it would restore harmony between the law and the fact of medical education.

In the end, the clearest proof that medical residents are students lies in the everyday observations of those most familiar with those residents—the attending physicians who oversee them. Attending physicians at teaching hospitals are hired to serve as teachers, and they recognize the residents as their students. Under the terms of FICA and fundamental principles of administrative law, the Treasury Department has no power to adopt a regulation that conflicts with this simple, well-understood fact.

CONCLUSION

For the reasons set forth above, *amici* BJC HealthCare, Capital Area Health Consortium, Inc., Henry Ford Health System, Memorial Sloan-Kettering Cancer Center, and Oregon Health & Science University respectfully submit that the decision of the United States Court of Appeals for the Eighth Circuit should be reversed and urge this Court to incorporate into its decision the points that *amici* have submitted.

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August 2010

AMICUS CURIAE BRIEF

No. 09-837

IN THE

Supreme Court of the United States

THE MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF COMMITTEE OF INTERNS AND RESIDENTS AND AMERICAN MEDICAL STUDENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CITED AUTHORITIES

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CASES:

Amro v. St. Luke's of Bethlehem,
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(E.D. Pa. 1986) 28-29

Balogun-Awosika v. Univ. of Md. Med. Sys. Corp.,
2002 U.S. Dist. LEXIS 26932 (D. Md. 2002),
aff'd, 60 Fed. Appx. 509 (2003) 29

Boston Medical Center,
330 N.L.R.B. 152 (1999) ..... *passim*

Brooklyn Eye & Ear Hosp. and House Staff Ass'n of Brooklyn Ear & Eye Hosp.,
32 S.L.R.B. 65 (N.Y. 1969) 25

Comm'n on Mental Health Serv. Dep't of Human Serv., D.C. Gov't and Comm. of Interns & Residents,
38 DCR 1628, Slip Op. No. 269,
PE.R.B. Case No. 90-R-04 (1991) 25

House Officers Ass'n v. Univ. of Neb. Med. Ctr.,
198 Neb. 697, 225 N.W.2d 258 (1977) 25

Long Beach Veterans Admin. Med. Ctr., Long Beach, Cal.,
7 F.L.R.A. 434 (1981) 25

Cited Authorities

Page

McBride v. United States,
462 F.2d 72 (9th Cir. 1972) 30

N.Y. Bronx Eye Infirmary, Inc. and House Staff Ass'n of the Bronx Eye Infirmary, Inc.
33 S.L.R.B. 245 (N.Y. 1970) 25

Navato v. Saint Luke's Hosp. of Kans. City,
1991 U.S. Dist. LEXIS 18465
(W.D. Mo. 1991) 29

Phila. Ass'n of Interns & Residents v. Albert Einstein Med. Ctr.,
92 L.R.R.M. 3410, 369 A.2d 711 (Pa. 1976) ... 22

Proskey v. Comm'r,
51 T.C. 918 (1969) 26

Regents of the Univ. of Cal. v. Pub. Emp. Relations Bd.,
41 Cal. 3d 601, 224 Cal. Rptr. 631, 715
P.2d 590 (1986) ..... *passim*

Regents of the Univ. of Mich. v. Emp't. Relations Comm'n.,
389 Mich. 96, 204 N.W.2d 218 (Mich. 1973) ... 24

Rockwold v. United States,
620 F.2d 166 (8th Cir. 1980) 26

St. Barnabas Hosp.,
335 N.L.R.B. No. 39 (June 3, 2010) 21, 22

Cited Authorities

Page

St. Barnabas Hosp.,
Decision and Direction of Election,
Case No. 2 RC-23356 (May 22, 2009) 21, 22

Univ. Hosp., Univ. of Cincinnati College of Med. v. State Emp't Relations Bd.,
63 Ohio St. 3d 339, 587 N.E. 835 (1992) 24

Woddail v. Comm'r of Internal Revenue,
321 F.2d 721 (10th Cir. 1963) 26

Zechman v. Christiana Care Health Sys.,
2007 U.S. Dist. LEXIS 47349
(D. Del. 2007) 29

STATUTES:

26 U.S.C. § 3121(b)(10) (2010) 2

29 U.S.C. §§ 151 *et seq.* (2010) 17

Age Discrimination in Employment Act of 1967,
29 U.S.C. § 621 (2010) 29

Americans with Disabilities Act of 1990,
42 U.S.C. §§ 12101 *et seq.* (2009) 29

Equal Pay Act of 1963,
29 U.S.C. § 206(d) (2010) 29

Cited Authorities

Page

Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2010) 29

Federal Insurance Contributions Act, 26 U.S.C. §§ 3101 *et seq.* (2010) 2

REGULATIONS:

10 N.Y.C.R.R. § 405.4(b)(6) (2010) 5

26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii) (2004) 2-3

OTHER AUTHORITIES:

Accreditation Council of Graduate Medical Education ("ACGME"), *Institutional Requirements* (2007), http://www.acgme.org/acWebsite/irc/irc_IRCpr07012007/pdf 15, 16

Allen Kachalia, MD, J.D., and David M. Studdert, LLB, *Professional Liability Issues in Graduate Medical Education*, 292 J. Am. Med. Ass'n. 1051 (2004) 29-30

American Medical Ass'n ("AMA"), *International Medical Graduates In American Medicine: Contemporary Challenges and Opportunities* (Jan. 2010), http://www.ama-assn.org/ama1/pub/upload/mm/18/img-workforce-paper.pdf 27-28

Cited Authorities

Page

American Osteopathic Association ("AOA"), *The Basic Documents for Postdoctoral Training* (July 2010), http://www.do-online.org/pdf/sir_postdoctrain proced.pdf 16

Barbara A. Green and Tim Johnson, *Replacing Residents with Midlevel Practitioners: A New York City Area Analysis*, 14 Health Affairs 192 (1995) 6-7

Boston Medical Center, *House Officer Agreement*, http://www.bmc.org/Documents/SAMPLE-HouseofficerContract.doc 16

Charles M. Preston, MD, MPH, et al., *Petition to Reduce Medical Resident Work Hours*, (Sept. 2, 2010), http://ww.citizen.org/documents/1917.pdf 9

Cheryl Ulmer, et al., eds., Institute of Medicine, *Resident Duty Hours: Enhancing Sleep, Supervision, and Safety* (2008), http://www.nap.edu/catalog/12508.html ... 11-12, 13

David A. Asch, MD and Ruth M. Parker, MD, *The Libby Zion Case, One Step Forward or Two Steps Backward*, 318, New Eng. J. Med. 771 (Mar. 24, 1988) 5

Cited Authorities

Page

GNYHA President Discusses Medicare GME Demo Project and Other GNYHA Initiatives at AAHC Spring Meeting, April 5, 2004, GNYHA Skyline News, http://www.gnyha.org/1536/Default.aspx ... 8

Hennepin County Medical Center, *Residency Agreement*, http://www.hcmc.org/education/documents/2009ResidencyAgreement.pdf ... 16

Internal Revenue Service, *Memorandum of Mary Oppenheimer, Assistant Chief Council, Department of the Treasury*, 15 ILM 200212029 (Jan. 24, 2002), http://ficarefund.tennessee.edu/IRS%201-24-2002%20Memo.pdf ..... *passim*

Kelly A. Carter, MD, et al., *RVU Ready: Preparing Emergency Medicine Resident Physicians in Documentation for an Incentive based Work Environment*, 16 Academic Emergency Med. 423 (2009) 9

Kenneth E. Thorpe, PhD, *House Staff Supervision and Working Hours: Implications of Regulatory Change in New York State*, 263 J. Am Med. Ass'n. 3177 (1990) 6

Cited Authorities

Page

Letter from Congressman John Dingell, House Energy and Commerce Comm. Chair to William Munier, MD, Acting Director of AHRQ (Mar. 29, 2007), http://energycommerce.house.gov/Press_110/110-ltr.032907.HHS.Munier.pdf 11

Lisa W. Foderaro, *Many Hospitals in New York Quit Plan for Fewer Doctors*, N.Y. Times (Apr. 1, 1999), http://www.nytimes.com/1999/04/01/nyregion/many-hospitals-in new-york-quit-plan-for-fewer-doctors.html 7, 8

Mark Noah, MD, FACP, *Resident Duty Hour Restrictions: Cost Impact* (Mar. 4, 2008), http://www.iom.edu/~/media/Files/Activity%20Files/Workforce/ResidentDutyHours/ResidentDutyHourRestrictionsCostImpactNoah.pdf 11

Mayo Clinic, *Summary of Terms and Conditions of Appointment* (2010), http://www.mayo.edu/pmts/mc0100-mc0499/mc0437-68.pdf 27

Medicare Payment Advisory Commission (MedPAC), *Rethinking Medicare's Payment Policies for GME and Teaching Hospitals* (Aug. 1999), http://www.aamc.org/advocacy/teachhosp/medpac/rethinkingmedicare.pdf 14

Cited Authorities

Page

MedPAC, *Report to Congress: Aligning Incentives in Medicare* (June 2010), http://www.medpac.gov/documents/Jun10_EntireReport.pdf 14

MedPAC, *Report to Congress: Improving Incentives in the Medicare Program* (June 2009), http://www.medpac.gov/documents/Jun09_ EntireReport.pdf 14

OSHA, Statement *by U.S. Department of Labor's OSHA Asst. Secretary Dr. David Michaels on long work hours, fatigue and worker safety* (Sept. 2, 2010), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=18285 10

Richard Liekweg, *Resident Work Hours: A Look at the University of California Experience* (Mar. 4, 2008), http://www.iom.edu/~/media/Files/Activity%20Files/Workforce/ResidentDutyHours/ALookattheUniversityofCaliforniaExperienceContemplatingtheCostsofReducingWorkHoursforPhysiciansinTrainingLiekweg.pdf 10 11

State University of New York at Buffalo, *Medical Resident Employment Agreement*, http://www.smbs.buffalo.edu/GME/documents/Resident_Contracts.pdf 16

Cited Authorities

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Suraj Kapa, MD, et al., *A Reliable Method for Internal Medicine Resident Clinics: Financial Implications for an Academic Medical Center*, 2 J. of Graduate Med. Edu. 181 (2010) 8, 9

Teryl K. Nuckols et al., *Cost Implications of Reduced Work Hours and Workloads for Resident Physicians*, 360 New Eng. J. Med. 2202 (2009) 13

United States Citizenship and Immigration Services ("USCIS"), *Form I-129, Petition for a Nonimmigrant Worker* (Dec. 4, 2009), http://www.uscis.gov/files/form/i-129.pdf 28

United States Department of Labor, *Labor Condition Application for Nonimmigrant Workers, ETA Form 9035 & 9035E*, http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9035_2009_Revised.pdf 28

University of Minnesota, *Visa Sponsorship Policy*, http://www.med.umn.edu/gme/residents/instpolicyman/VisaSponsorshipPolicy/index.htm 27

USCIS, *Instructions for Form I-129, Petition for a Nonimmigrant Worker* (Dec. 4, 2009), http://www.uscis.gov/files/form/i-129instr.pdf 28

STATEMENT OF INTEREST

The Committee of Interns and Residents, SEIU ("CIR") is the primary national voice for resident physicians in the United States.[1] CIR is party to dozens of collective bargaining agreements covering more than 13,000 resident physicians in the States of Massachusetts, New York, New Jersey, Florida, New Mexico and California as well as the District of Columbia. CIR negotiates contracts with hospitals establishing wages, hours, job security, health and disability insurance benefits and paid leave for its members just as other union contracts do for hundreds of thousands of other hospital employees. CIR is therefore intimately familiar with the facts pertinent to the employment of resident physicians.

The American Medical Student Association ("AMSA") is the nation's oldest and largest independent organization committed to representing the interests of the more than 67,000 medical students currently training in the United States. AMSA chapters include more than 33,000 pre-med and medical students organized around improving medical training. As an organization representing medical students, AMSA has specific familiarity with the responsibilities of medical students and the clinical role of interns and residents.

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1. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

CIR and AMSA have an interest in the Court having an accurate picture of the activities of resident physicians as it considers the question presented by this Petition. The issue of whether resident physicians are more like employees or more like students has arisen under multiple regulatory regimes which overwhelmingly treat resident physicians as employees rather than students.

Some *amici* have been unusually candid that their interest in this case includes obtaining a ruling that they can utilize to deprive resident physicians of employment-related benefits in areas other than Federal Insurance Contributions Act, 26 U.S.C. § 3101, *et seq.* ("FICA"). For instance, the University of Illinois argued in its amicus brief in favor of granting certiorari that a ruling finding resident physicians to be students under FICA will enable it to succeed in its efforts to convince the Illinois Department of Employment Security that resident physicians are not entitled to unemployment benefits if their employment is terminated. Brief of the Board of Trustees of the University of Illinois as Amicus Curiae in Support of Petitioners at 2, 7 (Feb. 16, 2010).

CIR and AMSA have a strong interest in demonstrating that resident physicians are employees entitled to the protection of labor and employment laws.

SUMMARY OF ARGUMENT

This case concerns the applicability of the student exception to a provision of the Internal Revenue Code at 26 U.S.C. § 3121(b)(10), and the regulations promulgated thereunder at 26 CFR § 31.3121(b)(10)-

2(d)(3)(iii), which treat resident physicians as employees under FICA. It is thus not disputed that resident physicians are employees at the institutions which employ them.

In arguing that the Treasury Department's construction of the statutory FICA student exemption is arbitrary, however, Petitioners and their supporting *amici* have seriously distorted the nature of medical residency. In fact, resident physicians are employees in the fullest sense of that term throughout their residency training programs; they are the primary care givers in many hospitals who daily make medical decisions with life and death consequences while providing real medical care to patients with real needs.

The extraordinary hours worked each week by resident physicians throughout the United States has been studied by the hospital industry since the 1980's. The resulting reports demonstrate the significant economic value of resident physicians to their hospitals. Depending on the number of hospitals included in each study, the cost of having other hospital employees perform the patient care work being done by resident physicians is in the millions or billions of dollars. It is apparent from the sheer cost of replacing them that resident physicians are not predominantly students who provide no financial benefit to their institutions.

The Court's judgment of the applicability of the statutory exemption should be informed by judicial and administrative determinations over decades in multiple forums. Despite the contrary assertion by Petitioners that "medical residents are widely classified as students

– by Congress, accrediting organizations and numerous courts – and medical residents consider themselves students," in truth Federal and State authorities have repeatedly concluded that the facts establish that resident physicians are covered by laws protecting employees (and not protecting students) over the objections of hospitals which have contended that residents should not be treated as employees. Brief for Petitioners at 31 (Aug. 6, 2010).

The demonstrated economic value of resident physicians to their hospitals and the repeated confirmations that resident physicians are entitled to the protection of labor and employment laws are relevant to the issue posed by this Petition.

ARGUMENT

I. RESIDENTS PROVIDE VALUABLE PATIENT CARE SERVICES AND IF RESIDENT WORK HOURS ARE REDUCED, HOSPITALS MUST REPLACE THEM WITH MORE EXPENSIVE HEALTHCARE PERSONNEL.

We write separately to provide the Court a fuller and more accurate sense of what resident physicians actually do than that presented by Petitioners and their *amici*. Numerous studies demonstrate that hospitals rely heavily on resident physicians to perform a wide range of critical patient care services every single day and would incur substantial costs if the resident physicians had to be replaced with other employees. The facts contradict Petitioners' assertion that they "permit their residents to care for patients purely for educational

purposes," Pet. Br., *supra* at 26, and that "residents do not provide a net economic benefit to petitioners." *Id.* at 27. Indeed, the decades-long and continuing struggle to reign in excessive work hours by resident physicians provides a window into the extent of hospitals' economic reliance on the substantial patient care and other work provided by resident physicians.

The first comprehensive study of how much it would cost hospitals to replace resident physician labor was published in 1990 in connection with the then recently enacted New York State regulations that limited residents' work hours.[2] The study observed that "given the thrust of New York State's regulations, physician

2. In 1984, a young woman, Libby Zion, died in the emergency room of a New York hospital at night while under the care of resident physicians. A grand jury report concluded that she died from preventable error, but rather than indict individual physicians, the report indicted the system of excessive resident physician work hours and grossly inadequate supervision. As a result of this report, the New York State Commissioner of Health appointed the Ad Hoc Advisory Committee on Emergency Services (chaired by Bertrand Bell, MD, and known as the Bell Committee). David A. Asch, MD and Ruth M. Parker MD, *The Libby Zion Case, One Step Forward or Two Steps Backward,* 318 New Eng. J. Med. 771 (1988). New York State commissioned the 1990 study to find out how much it would cost hospitals to comply with the recently enacted New York State Department of Health regulations that, among other things, capped resident work hours at 80 per week. Despite the strong opposition of the teaching hospitals, the Department of Health enacted regulations that limited the number of hours residents could work per week and consecutively. N.Y. Comp. Codes R. & Regs. Health tit. 10 §405.4(b)(6) (2010).

extenders would not be expected to substitute completely for the reduced hours worked by resident physicians. More likely, hospitals would hire a mix of new physicians and physician extenders to substitute for the reduced hours worked by resident physicians." Kenneth E. Thorpe, PhD, *House Staff Supervision and Working Hours: Implications of Regulatory Change in New York State*, 263 J. Am. Med. Ass'n 3177, 3179 (1990).

Dr. Thorpe concluded that if New York hospitals hired a mix of physicians and physician extenders (nurses, physician assistants, etc.) to replace the lost resident physicians' work hours spent on patient care, it would cost more than $89 million, but if New York hospitals only hired additional physicians to replace these lost resident hours, the annual cost would jump to $159.6 million. *Id.* at 3179. Thorpe further pointed out that residents not only did the work of physicians, but that they also did work that should be done by other staff (intravenous teams, phlebotomists, messengers and transporters). Given the amount of time that resident physicians spent doing such work, a substantial number of these other replacement staff would also be needed - at an additional cost of $64.6 million. *Id.* at 3180.

In 1995, the Greater New York Hospital Association (GNYHA)[3] published a study regarding the cost impact of federal regulatory proposals that would provide a financial incentive to hospitals to reduce the number of residents that they trained. Barbara A. Green and Tim

3. GNYHA represents 92 hospitals in the Greater New York City area, the overwhelming majority of which are teaching hospitals.

Johnson, *Replacing Residents with Midlevel Practitioners: A New York City Area Analysis*, 14 Health Affairs 192 (1995). GNYHA was deeply concerned that "reductions in residency training programs could jeopardize the ability of inner-city hospitals to care for patients unless adequate personnel are in place." *Id.* at 193. Assuming a 25% reduction of residents, the study evaluated two cost models. Under one cost model 10,000 Full Time Employees ("FTEs") were needed at a cost of $600 million; under a second model, 4,400 FTEs were needed at a cost of $336 million. *Id.* at 197. The GNYHA concluded with a warning that if a policy of decreasing the number of resident physicians were implemented without adequate funding, "these hospitals – many of which serve the poorest communities in the country – may be unable to continue providing high-quality patient care to our most vulnerable populations." *Id.* at 198.

Forty-nine New York City area hospitals participated in a demonstration project in the late 1990's designed to test a proposed federal policy of providing a financial incentive to hospitals to reduce the number of residents that they were training. The project enabled hospitals to continue to receive the same level of Medicare payments for residents while reducing the actual number of residents by 20% to 25% over six years. But after two years, one-half of the hospitals dropped out because they could not "function without the low-cost labor provided by... residents..." Lisa W. Foderaro, *Many Hospitals in New York Quit Plan for Fewer Doctors*, N.Y. Times, Apr. 1, 1999, http://www.nytimes.com/1999/04/01/nyregion/many-hospitals-in-new-york-quit-plan-for-fewer-doctors.html. The GNYHA President admitted that not only did the project fail,

but it spotlighted the centrality of the resident physician workforce for the hospitals: "It became clear how indispensable the residents are to providing high-quality care on a day-in, day-out basis..." *Id.* In the end, 42 of 49 hospitals withdrew from the program. *GNYHA President Discusses Medicare GME Demo Project and Other GNYHA Initiatives at AAHC Spring Meeting*, April 5, 2004, http://www.gnyha.org/1536/Default.aspx. The demonstration project's failure ended any consideration of a government policy to pay hospitals to decrease their resident complement; residents simply proved to be too cheap a labor source to be replaced by anyone else.[4]

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4. Recent studies have demonstrated the direct link between resident work, effective billing and hospital economic solvency. For example, a 2010 study of Petitioner Mayo Clinic concluded that the financial success of academic medical centers depends on appropriate billing for encounters between resident physicians and patients:

> The financial success of academic medical centers depends on appropriate billing for encounters between resident physicians and patients. This is particularly true in resident physicians' primary care clinics, where resident-patient encounters generate the majority of revenue...[S]ome institutions, including the Mayo Clinic, allow licensed residents to determine billing codes, with attendings providing only supervisory assistance.

Suraj Kapa, MD, et al, *A Reliable Method for Internal Medicine Resident Clinics: Financial Implications for an Academic Medical Center*, 2 Journal of Graduate Med. Educ. 181, 181 (2010). The Mayo study discovered that because of inappropriate coding by resident physicians, the Mayo Clinic was losing $450,368.54 annually for work attributable to

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In part to forestall regulation of resident physician work hours by the Occupational Health and Safety Administration, the Accreditation Council of Graduate Medical Education ("ACGME")[5], the central accrediting authority in the United States for resident physician programs, enacted its first resident work hour guidelines in 2003.[6] The guidelines, applied to all

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resident physicians. *Id.* at 184. *See also*, Kelly A. Carter, MD, et al, *RVU Ready: Preparing Emergency Medicine Resident Physicians in Documentation for an Incentive-based Work Environment*, 16 Academic Emergency Med. 423 (2009). (Increases in billing per second- and third-year Emergency Medicine resident physician and per patient seen by the Emergency Medicine resident physicians resulted in a large increase in billing performance of nearly $1.5 million annually).

5. The Accreditation Council on Graduate Medical Education oversees and accredits U.S. allopathic medical training programs. It is made up of five groups: the American Hospital Association, the Association of American Medical Colleges, the American Medical Association, the Council of Medical Specialties and the American Board of Medical Specialties.

6. A petition seeking OSHA regulation of resident physician work hours was filed in 2001 and dismissed after ACGME announced that it would institute hours limits effective July 1, 2003. In September 2010, another OSHA petition was filed on behalf of resident physicians. Charles M. Preston, MD, MPH, et al, *Petition to Reduce Medical Resident Work Hours*, (Sept. 2, 2010), http://www.citizen.org/documents/1917.pdf. OSHA has taken jurisdiction and will investigate the worker safety issues raised in the petition.

> We are very concerned about medical residents working extremely long hours and we know of evidence linking sleep deprivation with an increased

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ACGME-approved programs across the country, required an 80-hour work week averaged over four weeks and a 30-hour maximum shift length, among other limitations.

Two California teaching hospitals reported on their actual costs of compliance with the reduced resident physician work hours at the March 8, 2008 meeting of an Institute Of Medicine[7] ("IOM") Committee on Optimizing Graduate Medical Trainee (Resident) Hours and Work Schedules to Improve Patient Safety. The University of California San Diego Medical Center hired additional residents, hospitalists, midlevel providers and paid for additional moonlighting coverage; the additional cost was $4,342,614 a year. Richard Liekweg, CEO, UC San Diego Medical Center, *Resident Work Hours: A*

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> risk of needle sticks, puncture wounds, lacerations, medical errors and motor vehicle accidents. We will review and consider the petition on this subject submitted by Public Citizen and others....It is clear that long work hours can lead to tragic mistakes, endangering workers, patients and the public. All employers must recognize and prevent workplace hazards. That is the law. Hospitals and medical training programs are not exempt from ensuring that their employees' health and safety are protected.

OSHA, Statement, *U.S. Department of Labor's OSHA Assistant Secretary Dr. David Michaels on long work hours, fatigue and worker safety* (Sept. 2, 2010): http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=18285

7. Established in 1970, the IOM is the health arm of the National Academy of Sciences.

Look at the University of California Experience at 7-8 (Mar. 4, 2008), http://www.iom.edu/~/media/Files/Activity%20Files/Workforce/ResidentDutyHours/ALookattheUniversityofCaliforniaExperienceContemplatingtheCostsofReducingWorkHoursforPhysiciansinTraining Liekweg.pdf.

Cedars-Sinai Medical Center hired additional physicians and nurse practitioners; the additional cost was $2,170,100 a year. Mark Noah, MD, FACP, *Resident Duty Hour Restrictions: Cost Impact*, 9 (March 4, 2008), http://www.iom.edu/~/media/Files/Activity%20Files/Workforce/ResidentDuty Hours/ResidentDutyHour RestrictionsCostImpactNoah.pdf. Even the modest changes brought about by compliance with these ACGME rules produced evidence that resident physicians are essential components of the delivery of healthcare at teaching hospitals, not merely students who contribute nothing to the business of health care.

In 2007 the U.S. House of Representatives Committee on Energy and Commerce began a study of medical errors and requested assistance "in ascertaining if the long work hours of physicians and residents also are among the most serious threats to patient safety."[8] The resulting report went beyond work shift length and described the continued reliance by hospitals on resident physicians to perform the work of other staff. Cheryl

8. Letter from Congressman John D. Dingell, House Energy and Commerce Committee Chair, to William Munier, MD, Acting Director of Agency for Healthcare Research and Quality (Mar. 29, 2007), http://energycommerce.house.gov/Press_110/110-ltr.032907.HHS.Munier.pdf.

Ulmer, et al., eds., Institute of Medicine, *Resident Duty Hours: Enhancing Sleep, Supervision, and Safety* (2008), http://www.nap.edu/catalog/12508.html (hereinafter "IOM Report"). The IOM Report noted that despite the ACGME guidance "encouraging" the transfer of ancillary staff tasks to ancillary staff, "residents typically still spend a *substantial amount of time* searching for test results and supplies, completing paperwork, obtaining and transporting specimens for laboratory tests, moving patients, making appointments, and completing paperwork for patient discharges." IOM Report at 93. (Emphasis added).

The mix of personnel (nursing aides, laboratory technicians, licensed vocational nurses, physicians' assistants, nurse practitioners and attending physicians) used in the IOM replacement cost model demonstrates the extensive range of the resident physicians' work in the hospitals. In order to calculate replacement costs realistically, the IOM Report acknowledged that the more complex patient care duties of resident physicians can only be done by highly paid attending physicians. In the end, the IOM Report estimated the final replacement cost to be $1.7 billion:

> Recommendations for duty hour adjustments, enhanced supervision and workload reduction will best achieve the target goals when implemented in concert and implementation of all the committee's recommendations will require a significant investment of personnel to substitute for the hours that residents are no longer available. To cover some of the excess resident hours with substitute

> personnel would cost in the ballpark of $1.7 billion dollars, the equivalent of about 9 percent of direct and indirect graduate medical education payments made to teaching facilities from public and private sources.

IOM Report at 295. Moreover, while the $1.7 billion estimate is substantial, it only considers the *lost* resident physician hours. Depending on other reasonable assumptions, the replacement costs could be as high as $2.5 billion.[9]

> The labor costs associated with transferring all the excess work [of resident physicians] to alternative providers would be relatively high. ($1.1 billion to $2.5 billion), and the effectiveness of doing so is unknown. If the changes were highly effective, they could prevent patient harm at reduced or no cost to society.

Teryl K. Nuckols et al., *Cost Implications of Reduced Work Hours and Workloads for Resident Physicians*, 360 New Eng. J. Med. 2202, 2213 (2009). It is forceful testimony of the extremely high value of the total hours that resident physicians work at the hospitals and how much they contribute to the hospitals' financial well-being.

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9. *Amici* American Association of Medical Colleges and others admit that the cost to teaching hospitals to comply with a limitation in resident work hours is $3.2 million annually for each hospital and $1.6 billion in the aggregate annually. Brief of the Association of American Medical Colleges, et al., as *Amici Curiae* in Support of Petitioners at 26 (Aug. 13, 2010).

The Medicare Payment Advisory Commission (MedPAC), the independent Congressional Agency on issues affecting Medicare, also recognizes that residents provide comparatively inexpensive labor for the valuable clinical services they provide.[10] In 2009, MedPAC noted

> For hospitals, residents provide valuable clinical services, particularly on-call duties that may include writing timely prescription orders and conducting patient admissions. Hiring or contracting other physicians, physician assistants, or nurse practitioners to provide these activities and services is more expensive for the hospital because hospitals must pay them higher wages (Rich, E.C., et al. 2002 Medicare Financing of Graduate Medical Education: Intractable Problems, Elusive Solutions. *Journal of General Internal Med.* 12:283-292 et al. 2002)

MedPAC, *Report to Congress: Improving Incentives in the Medicare Program*, 27 (June 2009), http://www.medpac.gov/documents/Jun09_Entire Report.pdf.

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10. Medicare is the largest payer of graduate medical education — $9.5 billion in 2009. (MedPAC, *Report to Congress: Aligning Incentives in Medicare*, 103 (June 2010), http://www.medpac.gov/documents/Jun10_EntireReport.pdf. MedPAC has always recognized the essential employee relationship of residents and hospitals. In 1999, MedPAC stated that "[r]esidents earn a stipend because they provide patient care and perform other services that are of value to the hospital...The services provided by residents and other trainees are just one part of the enhanced patient care furnished in teaching hospitals." (MedPAC, *Rethinking Medicare's Payment Policies for GME and Teaching Hospitals*, 8 (Aug. 1999), http://www.aamc.org/advocacy/teachhosp/medpac/rethinkingmedicare.pdf.

These studies demonstrate that resident physicians provide significant economic value to their hospitals and that it is far from arbitrary to treat them as employees rather than as students.

II. RESIDENT PHYSICIANS ARE EMPLOYEES WHOSE WORK CONSISTS PRIMARILY OF PATIENT CARE.

A. The Agencies That Accredit Residency Programs Require Teaching Hospitals to Provide Residents With Terms and Conditions Associated with Employment.

Petitioners cite to the training requirements laid out for resident physicians by ACGME but give scant attention to the terms and conditions for the employment of residents that are also set out by the ACGME. The ACGME requires that resident physicians be presented annually with a written contract that outlines the terms and conditions of their residency training.[11] *See*, ACGME, *Institutional Requirements* 4, http://www.acgme.org/acWebsite/irc/irc_IRCpr07012007.pdf. The ACGME requires that these written contracts outline compensation ("financial support"), professional liability insurance, leaves of

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11. The Internal Revenue Service, in response to refund claims filed by teaching hospitals, conducted an investigation of several common residency programs and subspecialty programs. The IRS found that the contracts provided to resident physicians "resemble[ ] an employment contract of a typical non-student/employee." Memorandum of Mary Oppenheimer, Assistant Chief Counsel, 15, 1LM 200212029 (January 24, 2002) ("IRS Memo") http://ficarefund.tennessee.edu/IRS%201-24-2002%20Memo.pdf.

absence, sick leave, parental leave, vacation, health insurance, disability insurance, and grievance procedures. ACGME, *supra* at 4.

Since every resident training program is accredited by either the ACGME or a similar organization,[12] every teaching hospital in the United States is obligated to provide resident physicians with an individual written agreement that contains employment-related provisions as set forth above.[13]

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12. For example, the American Osteopathic Association ("AOA") accredits osteopathic residency training programs. The AOA, like the ACGME, also requires that programs present resident physicians with an annual written contract outlining the terms and conditions of residency. AOA, *The Basic Documents for Postdoctoral Training*, 35 (July 2010), http://www.do-online.org/pdf/sir_postdoctrainproced.pdf.

13. For example, the agreement used for residents employed at the State University of New York at Buffalo is entitled "Medical Resident Employment Agreement" and contains terms and conditions of employment such as salary, leave time and employee benefits. State University of New York at Buffalo, *Medical Resident Employment Agreement*, http://www.smbs.buffalo.edu/GME/documents/ResidentContracts.pdf. The Residency Agreement for Hennepin County Medical Center, one of the hospitals to which Mayo residents are assigned, identifies its resident physicians as "employees of Hennepin Healthcare Systems." Hennepin Cnty. Med. Ctr., *Residency Agreement*, 4 http://www.hcmc.org/education/documents/ 2009ResidencyAgreement.pdf. The "House Officer Agreement" for Boston Medical Center, *Amicus Curiae* in Support of Petitioner, states that resident physicians are "covered by the terms and conditions of the collective bargaining agreement between the Committee of Interns and Residents (a labor union) and the Boston Medical Center." Boston Med. Ctr., *House Officer Agreement*, 3, http://www.bmc.org/Documents/SAMPLE-HouseofficerContract.doc.

B. Resident Physicians are Employees Who Provide Patient Care Services for the Hospitals that Employ Them.

For several decades, in multiple forums, teaching hospitals have attempted to deprive resident physicians of the legal protections afforded to employees by arguing that they are students. However, nearly every federal agency, state agency, and state court that has received evidence and ruled on the subject in a variety of contexts has determined that residents are employees whose paramount activity is providing patient care.

The National Labor Relations Board ("NLRB" or "Board") is the federal agency vested with the responsibility of protecting the rights of private sector employees. 29 U.S.C. § 151, *et seq.* In 1999, the NLRB held that resident physicians were employees because they provided patient care for the hospital that employed them and were compensated for their services. *Boston Medical Ctr.*, 330 N.L.R.B. 152, 160 (1999).

Resident physicians "work notoriously long hours, which vary depending on the specialty and rotation." *Id.* at 153. For example, the Board determined that internal medicine residents at Boston Medical Center worked 60 to 90 hours per week over six or seven days depending on the unit to which they were assigned.[14]

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14. According to Dr. Roger Nelson, the Dean of Graduate Medical Education for the Mayo Foundation, Mayo residents "work[ ] in the hospitals and clinics between fifty and eighty hours per week." Joint Appendix 21a (hereafter "J.A. __"). Dr. Mark Melin, stated in a deposition that resident physicians work 75 to 80 hours per week. J.A.72a. See also, IRS Memo at 7 (IRS agents confirm that resident physicians, in most cases, work in excess of 80 hours per week.)

Surgical residents averaged 60 hours per week but worked longer hours when working in the intensive care unit. *Id.* at 184.[15] The direct patient care work performed by residents may assist their training but its primary purpose is to deliver the health care services that are the product of all hospitals, including teaching hospitals.

Resident physicians spend up to 80 percent of their time providing direct patient care by working on patient care teams and taking on responsibilities commensurate with their experience.[16] *Id.* at 153-154. They also spend five to eight hours per week at didactic conferences and one hour, six days per week, at morning reports. *Id.* at 155. Patient care activities take precedence over these didactic activities, as resident physicians are often required to miss didactic conferences to care for patients.[17] *Id.* at 185.

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15. *See*, IRS Memo at 7 (Residents in surgical and OB/GYN residencies report working in excess of 100 hours per week)

16. Resident physician programs typically last from three to seven years and frequently lead to subspecialty fellowships of one to two additional years. The package of employment benefits offered to resident physicians by the University of Minnesota appears at J.A.199a-200a. The salary the University of Minnesota offered to its resident physicians in 2005 through their 12th year of residency goes up to $51,629 per year. J.A. 172a. Resident physicians are frequently in their mid to late 30's or older and supporting a spouse and children. For example, approximately 50% of the resident physicians entitled to medical benefits in CIR sponsored health plans elect to receive family coverage.

17. *See also*, IRS Memo at 9 (IRS agents find that "didactic activities were secondary to patient care" because "if a patient needed a resident's attention, didactic activities gave way to

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Residents on inpatient wards are assigned 12 to 15 patients. *Id.* at 153-154.[18] Residents are responsible for hospital admissions and are the primary physicians interacting with patients' families.[19] They take medical histories, perform physicals, draw blood, start IV lines, and write admission and medication orders, as well as patient progress notes. Residents also order x-rays, consults, treatments[20] and write "do not resuscitate" orders that are only later co-signed by an attending physician. *Id.*

When residents see patients, they frequently do so outside the presence of an attending physician.[21] Residents even perform medical procedures outside the

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patient care needs. Residents reported that it was not uncommon to be 'beeped out' in order to handle a patient emergency."); *Regents of the Univ. of Cal. v. Public Emp't Relations Bd.*, 41 Cal.3d 601, 619, 715 P2d 590, 602 (S. Ct. Cal. 1986) (Because patient care is the "primary responsibility" of resident physicians, "it is not uncommon for [resident physicians] to be absent from didactic activities").

18. *See*, IRS Memo at 11 (Surgical residents reported to IRS agents that they saw "between 10 and 40 patients on a daily basis").

19. *See*, Affidavit of Roger Nelson, Mayo Clinic Dean of GME J.A. 21a ("Virtually all patients admitted to the Mayo hospitals" are seen by resident physicians).

20. *See*, Deposition of Dr. Michael Belzer, Hennepin County Medical Center, J.A. 34a-35a (Resident physicians do histories and physicals, order lab tests and x-rays.)

21. The contention that resident are always working under the watchful eye of faculty physicians is wildly inconsistent with the actual working lives of residents, who may see an attending

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presence of an attending physician, including arterial blood gases, thorancentesis, and lumbar punctures.[22] They also perform procedures as critical as the intubation of patients. *Id.* at 154.[23]

After their first year, resident physicians typically receive a medical license. *Id.* at 156.[24] They are then expected to perform more focused patient histories and physical exams, and they oversee the work of first-year residents. *Id.*[25] More senior resident physicians also perform more complicated procedures. Surgical residents, for example "are permitted to perform increasingly more complicated surgeries as their

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physician for as little as two to three hours of their regular 13-hour or even 30-hour shift. See, Deposition of Dr. Gordon Alexander, J.A. 69a. (Supervision is not literally an attending looking over a resident's shoulder at all times. See, Deposition of Dr. Terrill Rosborough, J.A. 54a).

22. *See*, Resident and Fellow Scope of Practice (Hennepin County Medical Center), J.A. 41a-43a (List of dozens of procedures that resident physicians do "independently").

23. *See*, Deposition of Jared Austin, J.A. 134-138a (Resident physicians perform intubations and lumbar punctures without an attending physician present).

24. *See*, Internal Medicine residency program description, J.A. 199a (Minnesota medical license available to residents who have completed their first year of residency).

25. *See*, Resident and Fellow Scope of Practice (Hennepin County Medical Center), J.A. 39a-41a (Discussion as how responsibilities increase as resident physicians proceed in their residency training).

experience increases." *Id.* at 155.[26] More senior resident physicians also make patient care decisions on their own. One resident, for example, testified that she made patient care decisions on her own 80% of the time. *Id.* at 154.[27]

The NLRB concluded that while resident physicians obtain an educational benefit by performing patient care, the hospital benefits from their services and the training does not detract from the residents' employee status. *Id.* at 160-161.[28]

The NLRB recently had the opportunity to reconsider the work status of resident physicians, and after developing an extensive record, reaffirmed its *Boston Medical Center* decision. In *St. Barnabas Hospital*, the Director of NLRB Region 2 issued a decision noting that the residents' working conditions at St. Barnabas Hospital were "nearly identical" to those

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26. *See*, Deposition of Dr. Gordon Alexander, J.A. 201a-202a (Residents perform procedures during gall bladder removal surgery including opening patient, exposing gall bladder, and closing patient).

27. *See also, Regents of the Univ. of Cal. v. Pub. Emp't Relations Bd.*, 41 Cal.3d 601, 619, 715 P.2d 590, 602 (S. Ct. Cal. 1986) ("In some cases, a patient may be admitted and discharged from the hospital without ever seeing an attending physician.")

28. *See also*, IRS Memo at 7 ("Facts developed by [IRS] agents consistently demonstrate that although programs have a significant educational component, patient services are not incident to a course of study. Instead, patient care is the paramount activity in the relationship between the resident and the employer.")

found by the Board in *Boston Medical Center. St. Barnabas Hosp.*, Decision and Direction of Election, Case No. 2 RC-23356, 17 (May 22, 2009).[29] In June of 2010, the NLRB upheld the Regional Director's decision. *St. Barnabas Hosp.*, 355 N.L.R.B. No. 39 (June 3, 2010).

In addition, over the last several decades, multiple agencies and state courts determined that resident physicians are entitled to legal protections afforded to employees. In all but one jurisdiction where the matter has been ruled on,[30] resident physicians have been found to be more like employees than students and therefore are not exempt from legal protections as students.

In *Regents of the Univ. of Cal. v. Public Emp. Relations Bd.*, 41 Cal. 3d 601, 224 Cal. Rptr. 631, 715 P2d 590 (1986), the Supreme Court of California found that there was substantial evidence to support the findings of the state Public Employment Relations Board

29. The Regional Director's decision, in addition to discussing facts that were identical to those found in *Boston Medical Center*, also cited, as evidence of employee status, the badges worn by resident physicians at St. Barnabas that identified them as "doctors" and "resident." *Id.* at 8.

30. Pennsylvania is the only jurisdiction to hold that resident physicians are more like students than employees and therefore are exempt from legal protections available to employees. *Philadelphia Ass'n of Interns & Residents v. Albert Einstein Medical Ctr.*, 92 L.R.R.M. 3410, 369 A.2d 711 (Pa. 1976) (Pennsylvania Supreme Court, in reversing Pennsylvania Labor Relations Board, found house staff to be students rather than "public employees.") This decision, however, is over 30 years old and is an outlier.

that the "educational objectives [of a residency training program] are subordinate to the services performed by [resident physicians]" and that resident physicians should, therefore, be granted collective bargaining rights pursuant to state statute. *Id.* at 41 Cal. 3d at 624, 224 Cal. Rptr. at 646, 715 P.2d at 605. The Court, in reaching its decision, cited "abundant testimony that [resident physicians] provide valuable patient care services" for their employers. *Id.* at 41 Cal. 3d at 618, 224 Cal. Rptr. at 642, 715 P.2d at 601. The testimony is strikingly similar to the facts discussed in the *Boston Medical Center* decision, and the facts cited in the record below. The Court reported that:

> From their first year of residency, [resident physicians] are immersed in all aspects of direct patient care. They perform physical examinations, obtain patient's medical histories, develop treatment plans, prescribe drugs, administer dangerous drugs which nurses are not permitted to administer, and perform various operations and procedures. First-year residents normally write all orders for patient treatment and prescriptions. [Resident physicians] are also required to supervise other personnel such as nurses and technicians.
>
> Some of the procedures performed by house staff—in most cases with no attending physician present – include bone marrow biopsies, intubation, running of respirators, drawing blood, cardiopulmonary resuscitation, administering barium enemas, upper GI's

> (evaluations of the intestinal tract), IVP's (evaluations of the urinary tract), bone marrow aspirations, and placement of catheters. Also house staff perform procedures in life-threatening situations without the presence of attending physicians, including open chest massage and placement of pacemakers and chest tubes.
>
> [Resident physicians] also deliver babies. They are often called upon to perform Caesarean sections, forcep deliveries, and emergency D and C's (dilation and curettage). In many instances these procedures are performed in the absence of an attending physician.

Id. at 41 Cal. 3d at 618-619, 224 Cal. Rptr. at 642-643, 715 P2d at 601-602.

Other courts and agencies have also determined, after examining the work-life of resident physicians, that they are not exempt as students from the protection of the law. See, *Univ. Hosp., Univ. of Cincinnati Coll. of Med. v. State Emp't Relations Bd.*, 63 Ohio St. 3d 339, 344, 587 N.E.2d 835, 839 (1992) (Supreme Court of Ohio upholds hearing officer's determination that "the primary purpose of [resident physicians] was not educational training but patient care" and therefore they were entitled to the protection of the State Public Employees' Collective Bargaining Act); *Regents of the Univ. of Mich. v. Emp't Relations Comm'n*, 389 Mich. 96, 112-113, 204 N.W. 2d 218, 225-226 (1973) (Michigan Supreme Court, citing testimony that "the principal

duty and responsibility of interns and residents is to diagnose and prescribe a patient care program and put it into effect," held that resident physicians are employees entitled to the protections of the Michigan Public Employees Relations Act.)[31]

In sum, federal agencies, state courts, and state agencies have thoroughly reviewed the patient care services provided by resident physicians as well as the educational components of residency training programs. Almost universally, these courts and agencies have determined that resident physicians are covered by various labor and employment laws as employees who perform work for the hospitals that employ them. While

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31. *See also, Long Beach Veterans Admin. Med. Ctr., Long Beach, Cal.*, 7 FLRA 434, 439-441 (1981). (Federal Labor Relations Authority found that resident physicians work long and irregular hours, exercise independent judgment, spend most of their working time performing patient care responsibilities and are thus employees entitled to the protection of the Federal Service Labor Management Relations Act); *House Officers Ass'n v. Univ. of Neb. Med. Ctr.*, 198 Neb. 697, 700-701, 255 N.W.2d 258, 260 261 (1977) (Supreme Court of Nebraska, noting that residents worked more than 80 hours per week, spent as much as 90 percent of their time providing primary patient care, and performed a variety of tasks and procedures without supervision, upheld trial court finding that resident physicians are employees entitled to the protection of the State Employee Collective Bargaining Act); *New York Bronx Eye Infirmary, Inc. and House Staff Ass'n of the Bronx Eye Infirmary, Inc.*, 33 S.L.R.B. 245, 250 (N.Y. 1970); *Brooklyn Eye & Ear Hosp. and House Staff Ass'n of Brooklyn Ear & Eye Hosp.*, 32 S.L.R.B. 65, 74 (N.Y. 1969); *Comm'n on Mental Health Serv. Dep't of Human Serv., D.C. Gov't and Comm. of Interns & Residents*, 38 DCR 1628, Slip Op. No. 269, P.E.R.B. Case No. 90-R-04 (1991).

these statutory and regulatory regimes are not identical to that at issue here, they represent a nearly uniform collection of fact-findings that establish that it is eminently reasonable for an agency to treat resident physicians as employees rather than students.

C. Federal Tax, Immigration And Anti-Discrimination Laws Recognize That Resident Physicians Are Employees.

The Tenth Circuit reasoned that resident physician income was subject to income tax because it was "difficult to imagine a more perfect example of an employer-employee relationship." *Woddail v. Comm'r of Internal Revenue,* 321 F.2d 721, 724 (10th Cir. 1963). See also *Rockswold v. U.S.*, 620 F.2d 166, 167 (8th Cir. 1980). Compensation paid to the Petitioners' residents is subject to income tax like all of their other employees. J.A. 171a-172a, 199a. The United States Tax Court has compared residency to the early stages of other professionals. "There can be no serious doubt that work as a resident physician provides highly valuable training, particularly in preparing for specialties in the various fields of medicine. Yet virtually all work as an apprentice, whether in medicine or law, carpentry or masonry, provides valuable training." *Proskey v. Comm'r*, 51 T.C. 918, 925 (1969).[32]

32. *Boston Medical Center* also concluded that the fact that residents receive post medical school training does not differentiate them from other early career professionals or apprentices whose status as employees has never been questioned.

> Nor does the fact that interns, residents, and fellows are continually acquiring new skills negate their status as employees. Members of all professions

(Cont'd)

Many residency programs, including that of Petitioners Mayo Clinic and University of Minnesota[33], rely on H-1B work visas to recruit graduates of foreign medical schools. AMA, *International Medical Graduates In American Medicine: Contemporary*

(Cont'd)

> continue learning throughout their careers, and many professions including those in the healthcare industry, require individuals to be trained after graduation in order to be licensed or received in the field. *See, eg. Warster, Bernardi,& Emmons, Inc.*, 192 NLRB 1049, 1050-1051(1971) (describing licensing process for graduates of architecture schools); *UTD Corp., 165 NLRB 346 (1967)* (apprentices in 4-year training program included in production and maintenance unit); *General Electric Co., 131 NLRB 100, 104 (1961)* (describing employer training program for apprentices in tool and die trade; 'the very purpose of an adequate apprenticeship program is to broadly train apprentices in their craft so that they may practice it in any industry or company or advance into executive or managerial responsibilities'); *Riverside Memorial Chapel, 92 NLRB 1594, 1595 (1951)* (describing steps necessary for apprentice embalmers to be licensed). 'Fledgling lawyers employed by a law firm spend a great deal of time acquiring new skills, yet no one would contend that they are [**47] not *employees* of the law firm.' *Regents of the University of Michigan v. Michigan ERC, 204 N.W. 2d 218, 226 (Mich. 1973).*

Boston Med. Ctr. at 161.

33. Mayo Clinic, *Summary of Terms and Conditions of Appointment*, 2, http://www.mayo.edu/pmts/mc0400-mc0499/mc0437-68.pdf; University of Minnesota, *Visa Sponsorship Policy*, http://www.med.umn.edu/gme/residents/instpolicyman/VisaSponsorshipPolicy/index.htm

Challenges and Opportunities, 29-30, (Jan. 2010), http://www.ama-assn.org/ama1/pub/upload/mm/18/img-workforce-paper.pdf. (Residency programs prefer H-1Bs over other types of visas when recruiting foreign-born resident physicians). H-1Bs are employment-based visas in which an employer petitions the United States Citizenship and Immigration Services (USCIS) to allow an alien to come to the United States to "perform services in a specialty occupation." USCIS, *Instructions for Form I-129, Petition for a Nonimmigrant Worker* at 3 (Dec. 4, 2009), http://www.uscis.gov/files/form/i-129instr.pdf.

In applying for an H-1B work visa on behalf of the residency program and resident physician, a residency program must identify itself as the "employer" and must provide "evidence that the proposed employment qualifies as a specialty occupation." USCIS, *supra* at 3. The I-129 also identifies the resident physician as a "worker," and requests a "job title" and "nontechnical job description," as well as the "wages" and "dates of intended employment." USCIS, *Form I-129, Petition for a Nonimmigrant Worker*, 1-4 (Dec. 4, 2009), http://www.uscis.gov/files/form/i-129.pdf. Programs seeking to employ residents pursuant to an H-1B visa must also file a Labor Condition Application for Nonimmigrant Workers ("LCA") with the United States Department of Labor. http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9035_2009_Revised.pdf. On the LCA, residency programs must agree to pay the resident physician "at least the local prevailing wage." *Id.*

Resident physicians are recognized as employees under Title VII of the Civil Rights Act, *Amro v. St. Luke's of Bethlehem*, 1986 U.S. Dist. LEXIS 30559 (E.D.

Pa 1986); *Navato v. Saint Luke's Hosp. of Kansas City*, 1991 U.S. Dist. LEXIS 18456 (W.D. Mo. 1991)(Court rejected hospital's argument that resident physicians were not employees protected by Title VII). The Equal Employment Opportunity Commission ("EEOC") has also ruled that resident physicians are employees for purposes of the Age Discrimination in Employment Act ("ADEA") and the Equal Pay Act ("EPA"). EEOC Decision No. 88-1, 47 Fair Empl. Prac. Cas. 1887 (June 27, 1988). In addition, resident physicians have been allowed to seek redress for violations of the Family Medical Leave Act ("FMLA"), *Balogun-Awosika v. Univ. of Md. Med. Sys. Corp.*, 2002 U.S. Dist. LEXIS 26932 (D. Md. 2002) *aff'd*, 60 Fed. Appx. 509 (2003); and the Americans With Disabilities Act. *Zechman v. Christiana Care Health Sys.*, 2007 U.S. Dist. LEXIS 47349 (D. Del. 2007).

D. Resident Physicians Nationwide Can Be Held Liable for Medical Malpractice and in Many States They Are Held to the Same Standard of Liability as Attending Physicians.

The fact that State decisional laws also equate resident physicians with attending physicians employed by a hospital for purposes of medical malpractice liability further demonstrates that they are hospital employees engaged in independent patient care. When the actions of a resident physician are judged in a medical malpractice case, they "must conform at least to the standard of care expected of a general practitioner." Allen Kachalia, M.D., J.D., and David M. Studdert, LLB, *Professional Liability Issues in Graduate Medical Education*, 292 J. Am. Med. Ass'n 1051, 1052 (Sept. 1,

2004). Thus, there is no medical malpractice "student" exemption for resident physicians as they are held to the same standard of care as attending physicians. *McBride v. U.S.*, 462 F.2d 72, 74 (9th Cir. 1972) (Resident who had completed one-and-one-half years of residency was evaluated by the standard applicable to a general licensed physician staffing an emergency room.) In fact, "Courts have held resident physicians in specialty training to the same standard expected of the *average specialist* in that specific field." Kachalia, *supra* at 1052 (emphasis supplied).

E. Medical Students Are Not Employees and Do Not Have the Same Patient Care Responsibilities as Resident Physicians.

Petitioners and *amici* attempt to blur the distinction between resident physicians who are employees and medical students who are not. There are, however, stark and important differences between being a resident physician and being a medical student.

While medical students have limited interaction with patients, they do not have anywhere near the level of patient care responsibility that resident physicians have, and are limited as to what they can do in regard to patient care. For example, as detailed in the Joint Appendix, if a medical student writes a patient order it must be countersigned by a resident physician or attending physician, and if they administer intravenous medications it must be under the direct supervision of a resident physician.[34]

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34. Resident and Fellow Scope of Practice (Hennepin County Medical Center) J.A. 43a.

The Internal Revenue Service detailed the differences between resident physicians and students in a report, see note 16 *infra*, which noted that, unlike resident physicians, medical students "do not get paid for the services they perform; receive employee benefits; develop and initiate specific patient treatment plans; order tests, and write prescriptions; make any independent medical decisions - - such as changing medicine dosages; or take charge of a ward or other service areas, especially during the night. They are generally not even allowed to write notes for the medical record." IRS Memo at 17. In addition, the IRS found that medical students are not permitted to work more than 19 hours per week.[35] *Id.* at 18.

In sum, resident physicians, unlike medical students, are professional employees who provide valuable patient care services for the hospitals that employ them and have been categorized as employees, and not as students in a wide variety of regulatory and judicial procedures.

35. *See also, Boston Med. Ctr.*, 330 N.L.R.B. at 157 (citing brief of AMSA in which the organization contests as "factually contrary to the experience of the membership of its organization" the argument that resident physicians have an academic relationship with their hospitals that is similar to the one medical students have with their hospital.)

CONCLUSION

Resident physicians are employees entitled to the protections of Federal and State labor and employment laws and therefore, the judgment of the Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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October 4, 2010

AMICUS CURIAE BRIEF

No. 09-837

IN THE

Supreme Court of the United States

THE MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF DOCTORS COUNCIL S.E.I.U. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Treasury Department correctly categorized resident physicians as employees rather than students within the meaning of 26 U.S.C. § 3121(b)(10).

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OTHER AUTHORITIES:

American Board of Medical Specialties, *Maintenance of Certification Competencies and Criteria*, http://www.abms.org/Maintenance_of_Certification/MOC_competencies.aspx 14

American Board of Radiology, *Maintenance of Certification, Diagnostic Radiology FAQ*, http://www.theabr.org/moc/moc_faq_happens.html 16

American Board of Surgery, *ABS Maintenance of Certification Requirements* (updated 2010), http://home.absurgery.org/default.jsp?exam-mocreqs 15, 16

American Board of Surgery, *ABS Maintenance of Certification Q & A* (updated 2010), http://home.absurgery.org/default.jsp?exam-mocqa 16

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Accreditation Council of Graduate Medical Education, *Common Program Requirements* 7-9 (2007), http://www.acgme.org/acWebsite/dutyHours/dh_dutyhoursCommonPR07012007.pdf 14

American Medical Association, *Principles of Medical Ethics* (Rev. 2001), http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.shtml 11

American Medical Association, *The Physician's Recognition Award and Credit System* 4-7, 10 (2010), http://www.ama-assn.org/ama1/pub/upload/mm/455/pra-booklet.pdf 15

American Medical Association, *About the Council on Medical Education*, http://www.ama-assn.org/ama/pub/about-ama/our-people/ama-councils/council-medical-education.shtml 17

David B. Reuben, MD, *Depressive Symptoms in Medical House Officers*, 145 Archives of Internal Med. 286 (February 1985) 2

Glese Verlander, MD, JD, *Female Physicians: Balancing Career and Family*, 28 Acad. Psychiatry 331 (December 2004) 2

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Laura K. Bargar, PhD, *et al.*, *Extended Work Shifts and the Risk of Motor Vehicle Crashes among Interns*, 352 New Eng. J. Med. 125 (January 13, 2005) 2

Minnesota Board of Medical Practice, *Physician Fact Sheet* 2 (2009), http://www.state.mn.us/mn/externalDocs/BMP/Physician_Fact_Sheet_041703095702_Form-MDFactS2009.pdf 16

Najib T. Ayas, MD, MPH, *et al.*, *Extended Work Duration and the Risk of Self-reported Percutaneous Injuries in Interns*, 296 JAMA 1055 (September 6, 2006) 2

Report of the Council on Medical Education, *Expectations for Lifelong Learning*, CME Report 13-A-10 3 (2010), http://www.ama-assn.org/ama1/pub/upload/mm/377/cme-rep13-a10/pdf 12, 13, 17

Suraj Kapa, MD, *et al.*, *A Reliable Billing Method for Internal Medicine Resident Clinics: Financial Implications for an Academic Medical Center*, Vol. 2, No. 2, Journal of Graduate Med. Edu. 181 (2010) ... 8, 11

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Susan Riddle Brian, *Women in Medicine*, 64 Am. Family Physician, 174 (July 1, 2001) 2

Tracie M. O'Neill, MD *et al.*, *Risk of Needlesticks and Occupational Exposures Among Residents and Medical Students*, 152 Archives of Internal Med. 1451 (July 1992) 2

INTEREST OF *AMICUS CURIAE*[1]

Doctors Council S.E.I.U. is a labor organization that represents approximately 2,600 attending physicians in the public and private sector in New York, New Jersey, Pennsylvania and Illinois. Although we represent attending physicians, Doctors Council S.E.I.U. is concerned about the rights, working conditions and well-being of all physicians, including residents.

Doctors Council S.E.I.U.'s interest in this case is in seeing that resident physicians, who work a grueling schedule of up to 80 hours per week, are not excluded from the protections enjoyed by other employees on the pretext that they are only "students". In particular, we are concerned that a finding by the Court that resident physicians are students will be used as a tool to erode many of the legal protections that residents currently possess, such as the right to take family medical leave, the right to collectively bargain over their working conditions and their right to unemployment insurance should the hospital that employs them close.

In this case, a finding that resident physicians are "students" would result in the loss of social security death and disability benefits, a potentially devastating result for physicians who are at risk of suffering from

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1. Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus made a monetary contribution to its preparation or submission. The parties have consented in writing to the filing of this brief.

employment-related injuries and deaths such as transmission of infectious diseases due to needlesticks, depression and motor vehicle accidents. Najib T. Ayas, MD, MPH. et al., *Extended Work Duration and the Risk of Self-reported Percutaneous Injuries in Interns*, 296 JAMA 1055 (September 6, 2006); Laura K. Bargar, PhD, et al., *Extended Work Shifts and the Risk of Motor Vehicle Crashes among Interns*, 352 New. Eng. J. Med. 125 (January 13, 2005).[2] The loss of those protections and benefits are all the more significant for those resident physicians with families.[3]

Many of our members are attending physicians in teaching hospitals who work closely with resident physicians. The description of the work of resident physicians presented by Petitioners and their supporting *amici* is contrary to our experience working with residents on a daily basis.

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2. *See also*, David B. Reuben, MD, *Depressive Symptoms in Medical House Officers*, 145 Archives of Internal Med. 286 (February 1985)(Interns and residents on intensive care rotations suffer from high rates of depression); Tracie M. O'Neill, MD et al., *Risk of Needlesticks and Occupational Exposures Among Residents and Medical Students*, 152 Archives of Internal Med. 1451 (July 1992)(Residents at high risk of exposure to patients' blood and body fluids).

3. Glese Verlander, MD, JD, *Female Physicians. Balancing Career and Family*, 28 Acad. Psychiatry 331 (December 2004)(Residency is the most common period for female physicians to give birth to their first child); Susan Riddle Brian, *Women in Medicine*, 64 Am. Family Physician, 174 (July 1, 2001)(More than one-half of female physicians have their first child during residency.)

The practice of medicine in our society, where the volume of scientific knowledge is expanding at a constantly increasing rate, requires that all physicians engage in a program of study and self-education throughout their careers. That residents are engaged in such a process at the outset of their career should not devalue the work that they do and should not be used as an excuse to treat them as if they were not the essential part of the patient care team which the current model for delivery of patient care requires that they be.

SUMMARY OF ARGUMENT

I. Resident physicians perform essential services for Petitioners. They are engaged in on-the-job training and are not students.

A. The resident physicians employed by the Mayo Foundation and University of Minnesota treat patients on their own and make independent patient care decisions. They are an essential part of the patient care team at teaching hospitals and provide many patient care services which would be performed by other employees if they were not present. Residents perform a substantial part of their work without any direct supervision. The delivery of patient care in hospitals requires a team effort. Resident physicians routinely see patients on their own, perform procedures without supervision and make independent decisions about the type of care to provide.

B. The oversight of the work of residents by attending physicians is at arm's length. While residents report to attending physicians who review their work,

the residents are not closely supervised. Residents often see patients by themselves and perform many medical procedures without an attending physician present. All of these patient encounters are billed for by institutions such as the Mayo Clinic.

II. The nature of medicine requires that all physicians must be committed to life-long learning.

A. Board-certified physicians are required to participate in an educational program and pass a test to remain certified. The American Medical Association's principles of medical ethics require physicians to engage in medical education throughout their careers. Most states require physicians to participate in continuing medical education as a condition of maintaining their medical licenses. Moreover, the American Board of Medical Specialties and the individual medical specialty boards require board-certified attending physicians to participate in continuing medical education in order to maintain board certification. In order to maintain board certification, a physician is required to pass a re-certification exam in which attending physicians are evaluated in the same competencies as resident physicians.

For example, the American Board of Surgery requires board-certified surgeons to complete a minimum of 50 hours of continuing medical education each year. Thirty of those hours must be satisfied through live learning activities such as attendance at conferences and seminars or participation in workshops or journal clubs. Attending physicians may earn their

required educational credits by attending the same lectures that resident physicians attend. Board-certified physicians in other specialties must also comply with similar requirements and pass an exam to retain their certification.

B. Residency training is simply part of the continuing education all physicians must undergo. Physicians are required to continue their education throughout their professional careers. Residency training is a crucial component of that continuum. But it is more analogous to on-the-job training than the structured classroom and textbook study that are the primary components of an educational program for those who are commonly understood to be students.

The majority of a resident's time is spent providing patient care. The educational requirements for residents parallel those for board-certified attending physicians. The on-the-job learning that resident physicians undergo is very different from the traditional concept of what constitutes a student. The educational activities in which residents participate do not make a physician a "student".

ARGUMENT

I. RESIDENT PHYSICIANS PERFORM ESSENTIAL SERVICES FOR PETITIONERS. THEY ARE ENGAGED IN ON-THE-JOB TRAINING AND ARE NOT STUDENTS.

Resident physicians are an essential part of the patient care team at teaching hospitals. Resident physicians provide many patient care services and if they were not present, then other health care workers such as attending physicians, nurses, physician assistants, techs and transporters would have to perform this work. Attending physicians at teaching hospitals rely upon residents to perform many of the rudimentary, albeit important, aspects of patient care. As resident physicians progress, they are relied upon to oversee the work of junior residents and perform many medical procedures. J.A. 38a, 58a, 87a–89a, 99a-101a.

While attending physicians are ultimately responsible for the patients cared for by resident physicians, residents perform a substantial part of the work independently. In addition, while the guidelines of the Accreditation Council of Graduate Medical Education ("ACGME") require that residents be closely supervised, most oversight of the work of residents is conducted at arm's length. J.A. 41a-43a, 67a-68a, 99a-101a.

In arguing that resident physicians are students, Petitioners note that residents are not as efficient as attending physicians and do not have the same practice opportunities as attendings. That, however, misses the point. The question is not whether resident physicians

are attending physicians. Instead, the key question is whether a regulation that disqualifies resident physicians from consideration for the student exemption under the Federal Insurance Contributions Act is reasonable in light of the fact that residents perform work for 40 or more hours each week. J.A. 72a, 113a. In light of the overwhelming evidence that resident physicians perform valuable services for not only the Petitioners, but hospitals nationwide, the question presented must be answered in the affirmative. Accordingly, the decision of the Eighth Circuit Court of Appeals should be affirmed.

A. The Resident Physicians at the Mayo Foundation Treat Patients on Their Own and Make Independent Patient Care Decisions.

The successful delivery of healthcare in hospitals requires a team effort. While attending physicians such as those represented by Doctors Council S.E.I.U. are responsible for the overall care of a patient, the provision of that care requires the services of nurses, physician assistants, techs and resident physicians. J.A. 34a-35a.

The record shows that residents are an important part of the health care team at the Mayo Foundation for Medical Education and Research ("Mayo Foundation") and the University of Minnesota. Resident physicians routinely see patients on their own, perform procedures without supervision and make independent decisions about the type of care to provide. J.A. 36a, 41a-43a, 67a-68a, 99a-101a, 134a-138a.

Petitioners can and do bill for this work. While resident physicians cannot bill directly for patient care services under their own name, attending physicians can bill for the services provided by residents as long as the attending is "in the vicinity" of the resident. J.A. 66a. Hospitals typically bill for procedures performed by residents. Suraj Kapa, MD, et al., *A Reliable Billing Method for Internal Medicine Resident Clinics: Financial Implications for an Academic Medical Center*, 2 Journal of Graduate Med. Educ. 181 (June 2010). Although the attending physician signs the billing sheet, it can be and often is the resident physician who does much of the work.

Thus, while the resident physicians employed by Petitioners and other teaching hospitals may be improving their skills as they gain experience caring for patients – as is the case for any professional in the early stages of his/her career – the fact remains they are working and the hospital is earning revenue from that work.

The record reflects that Petitioners' resident physicians routinely act independently in their care of patients. While it is indisputable that the work of resident physicians is overseen by attending physicians in that residents report to and review their work with an attending, much of their reporting to attendings occurs *after* patient care has been provided. J.A. 67a-69a, 91a-92a. In addition, there are times when an attending is not available and in such situations residents will consult with each other where there are questions as to the appropriate care to provide. J.A. 36a-37a, 40a-41a.

For example, the record reflects that Petitioners' residents working overnight in the hospital could determine that a patient has meningitis and decide to perform a lumbar puncture.[4] J.A. 36a. If the resident was uncertain about the procedure, he/she would seek the assistance of a senior resident rather than contact an attending, who typically would not be at the hospital. J.A. 36a-37a.

Similarly, resident physicians employed by Petitioners write hospital orders – the primary method of carrying out patient care – independently and without the need for an attending to co-sign them. J.A. 132a-133a. Those decisions are made without the initial input of an attending.

This level of independent activity by resident physicians is consistent with the experience of Doctors Council S.E.I.U. at the teaching hospitals at which its members work. Residents are highly trained physicians who, while not at the level of attending physicians, are employees who provide essential patient care. J.A. 58a.

Whether or not residents ultimately report to an attending physician on the care they have provided, the care provided and the decisions made cannot be undone. When a physician, any physician, decides on a course of treatment and in furtherance of that plan orders tests, performs procedures and provides medication based upon that treatment plan, no matter how routine, he

4. A lumbar puncture involves the insertion of a needle into the spine to extract spinal fluid. J.A. 135a. Lumbar punctures can be performed by a resident physician without the supervision of an attending. J.A. 37a, 42a.

has made an independent decision. That he may later report to a superior on that course of treatment and the decisions that were made does not alter the independent nature of the decision-making process.

B. The Oversight of the Work of Resident Physicians by Attendings Is at Arm's Length.

Petitioners argue that resident physicians are directly and closely supervised by attendings and that this supervision renders residents students. This argument fails for two reasons: (1) much of the "supervision" of residents is actually conducted at arm's length by an attending after the treatment has been rendered; and (2) whether or not, and to what degree, an individual is supervised does not make him/her any more or less an employee.

While resident physicians report to attendings and attendings will review their work, residents are not closely supervised. Contrary to the claims by the Petitioners, attendings are not "looking over a resident's shoulder." J.A. 54a. The record is clear that residents often see patients by themselves and perform many medical procedures without an attending present. J.A. 41a-43a, 99a-101a.

At some point during their first year, resident physicians working in a clinic typically conduct physical examinations without an attending present. J.A. 99a-101a. Resident physicians can also perform a number of invasive procedures with an attending present. J.A. 41a-43a. The facts at the Mayo Clinic and the University of Minnesota are similar to the experiences of the members of Doctors Council S.E.I.U.

Resident physicians do, of course, report to attendings. After completing all of the work necessary to admit a patient, the resident will contact the attending to review the resident's treatment plan. In addition, a resident physician will review the results of a clinical examination with the attending assigned to a clinic. This team approach to health care allows multiple patients to be seen simultaneously by several residents at a clinic while one attending – referred to as a "preceptor" – oversees their work. All of these patient encounters are billed for by institutions such as the Mayo Clinic. Suraj, *supra*.

II. THE NATURE OF MEDICINE REQUIRES THAT ALL PHYSICIANS MUST BE COMMITTED TO LIFELONG LEARNING

A. Board-Certified Physicians Are Required to Participate in an Educational Program and Pass a Test to Remain Certified.

The American Medical Association's ethical code states that a "physician shall continue to study, apply, and advance scientific knowledge [and] maintain a commitment to medical education." American Medical Association, *Principles of Medical Ethics*, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.shtml.

Most states require that physicians participate in continuing medical education as a condition of maintaining a medical license. Report of the Council on Medical Education, "Expectations for Lifelong

Learning" CME Report 13-A-10, 3 http://www.ama-assn.org/ama1/pub/upload/mm/377/cme-rep13-a10.pdf. That report continues:

> "Physicians may gain AMA PRA Category 1 CME Credits™ by participation in a variety of learning formats, such as:
>
> • Live activities where a physician attends an educational session in person or virtually (for example, over the Internet).
>
> • Use of enduring materials, including printed, recorded, audio, video and/or online activities that may be used over time and at various locations and that, in themselves, constitute a structured CME activity.
>
> • Journal-based CME where the physician selects and reads a designated article in the peer-reviewed medical literature and engages in reflection or interaction based on the article's content (for example, through an evaluation or. examination).
>
> • Test item writing where the physician contributes to the development of a designated high-stakes examination or specific self-assessment module by researching, drafting, and defending a test item.
>
> • Manuscript review where the physician critically reviews assigned journal

manuscripts under the direction of a journal editor and an accredited CME provider.

- Performance improvement where a physician or group of physicians can, using a structured, long-term process, learn about selected performance measures, apply such measures to respectively or prospectively assess their practices, and re-evaluate their performance after an interval.

- Internet point of care learning where physicians engage in structured, self-directed online learning on topics relevant to their practices."

Id. at 3

In recognition of the duty of a physician to continue to obtain training throughout his/her career, the American Board of Medical Specialties ("ABMS") and the individual medical specialty boards require board-certified attending physicians to engage in an extensive educational program in order to maintain certification. The ABMS is an umbrella organization comprised of 24 medical specialty board members such as the American Board of Surgery ("ABS") and the American Board of Internal Medicine ("ABIM"). www.abms.org. The ABMS is responsible for developing common standards for the evaluation and certification of physicians. When a resident physician becomes board-certified, it is the individual medical specialty boards that set out the specific certification requirements and give the certification exam. In most cases, board certification lasts 10 years.

To remain board-certified, physicians are required to participate in an educational program called Maintenance of Certification ("MOC"). MOC is a program of educational activities, culminating in a recertification exam, in which attendings are evaluated in the *same core competencies as resident physicians.*

The MOC program evaluates board-certified physicians on a continuous basis in the six areas known as the essential core competencies: (1) medical knowledge, (2) patient care, (3) interpersonal and communication skills, (4) professionalism, (5) practice-based learning and improvement and (6) systems-based practice. http://www.abms.org/Maintenance_of_Certification/MOC_competencies.aspx.

These are the identical categories in which the ACGME requires residents to be assessed. ACGME, *Common Program Requirements*, 7-9 http://www.acgme.org/acWebsite/dutyHours/dh_dutyhoursCommonPR07012007.pdf. To prove their competency in these core areas, the MOC program requires board-certified physicians to (1) provide evidence of professional standing, (2) participate in an educational and self-assessment program as determined by their medical specialty board, (3) pass a recertification exam to prove they possess "cognitive expertise" in their medical specialty and (4) demonstrate that they use best practices based upon established national benchmarks and the work of their peers. The method of achievement is determined by the individual specialty boards. http://www.abms.org/Maintenance_of_Certification/MOC_competencies.aspx.

For example, to fulfill the learning and self-assessment educational requirements, the ABS requires board-certified surgeons to complete a minimum of 50 hours of CME annually. http://home.absurgery.org/default.jsp?exam-mocreqs. Thirty of those hours must be satisfied through live learning activities such as attendance at conferences and seminars; participation in workshops or journal clubs; computer, video or audio-based activities; or through critical review of a journal manuscript, among other methods. Many of these activities require the physician to engage in a post-activity assessment of what he/she learned, such as a test. American Medical Association, *The Physician's Recognition Award and credit system*, 4-7 http://www.ama-assn.org/ama1/pub/upload/mm/455/pra-booklet.pdf. (2010). Some of the learning activities physicians may engage in to complete the remaining 20 hours include research, reading authoritative medical literature and participating in small group discussions. http://www.ama-assn.org/ama1/pub/upload/mm/455/pra-booklet.pdf. *Id. at 10.*

Attending physicians may earn their required educational credits by attending the same lectures that resident physicians attend. J.A. 71a; *see also Boston Medical Center*, 330 NLRB 152, 186 (1999)(BMC attendings fulfilled their CME requirements in part "by attending grand rounds and other conferences at BMC, including those in which the talks are given by *residents*." Emphasis supplied).

Board-certified surgeons must also participate in a quality assessment program that measures their performance against professional standards. In

addition, they must provide evidence that they possess an unrestricted medical license. Evidence that they have completed these requirements, in addition to documenting that they have satisfied the annual medical education requirements, must be submitted to the ABS every three years. http://home.absurgery.org/default.jsp?exam-mocreqs.

To remain board-certified, surgeons must pass a recertification exam near the end of their 10-year certification period. However, they must fulfill their MOC educational requirements throughout the 10-year period to be eligible to take the examination. Failure to complete the educational requirements or pass the exam will result in loss of board certification for the surgeon. http://home.absurgery.org/default.jsp?exam-moeqa.[5] Board-certified physicians in other specialties, such as radiology, must also comply with MOC requirements and pass an exam to avoid having their certification withdrawn. http://www.theabr.org/moc/moc_faq_happens.html

5. Even physicians who are not board certified or who do not wish to remain certified still must comply with continuing medical education requirements imposed upon them by the medical board of the state in which they are licensed. For example, physicians licensed in Minnesota must complete 75 hours of CME credits every three years as a condition of licensure renewal. http://www.state.mn.us/mn/externalDocs/BMP/Physician_Fact_Sheet_041703095702_Form-MDFactS2009.pdf.

B. Residency Training Is Simply Part of the Continuum of Education That All Physicians Must Undergo.

Amicus agrees with Petitioners that the medical education of a doctor begins, but does not end, in medical school. In fact, the education of a physician never ends as it is the expectation and duty of all physicians to "continue their education throughout their professional careers." Report of the Council on Medical Education, *supra* at 2.[6] A medical career involves a continuum of education in which all physicians are required to maintain their skills and build upon their fund of knowledge throughout their careers.

Residency training is a crucial component of that continuum. But residency is more analogous to on-the-job training than the structured classroom and textbook study that are the primary components of the educational program for those who are commonly understood to be students. That resident physicians are learning on the job does not make them students and does not alter the fact that the majority of their time is spent providing valuable patient care services. They are no different than any other young professional who while possessing a degree, still needs to acquire the practical knowledge and judgment that only comes with experience.

---

6. The Council on Medical Education formulates policy on medical education and makes recommendations on such policies to the AMA's House of Delegates. http://www.ama-assn.org/ama/pub/about-ama/our-people/ama-councils/council-medical-education.shtml.

There are clear parallels between the educational requirements for resident physicians and board-certified attending physicians. Both have already earned a medical degree. Both are required to earn educational credits, which are satisfied in a number of different ways such as attendance at conferences and participation in activities such as journal club. Both are evaluated in the same six core competencies. Both are engaged in an ongoing assessment of their abilities and knowledge. And, finally, the process for both culminates in a certification exam offered by a specific medical specialty board.

In the case of both resident physicians and attending physicians, the overwhelming majority of the work week is committed to direct patient care. The mandatory educational component for each is essential to providing high quality patient care at a state-of-the-art level. While it is true that the educational component represents a larger part of the work week for resident physicians, this does not make them students. Their primary focus is patient care. In the process, they acquire valuable experience and training which qualify them for what they will do for the balance of their careers. Attending physicians continue to learn and acquire experience and training in their first years after completion of a residency and throughout their careers.

Physicians are students of medicine throughout their careers; educational activities and a program of self-study are an essential *part of the job of being a physician*, whether one is a resident or an attending physician. Participation in such activities does not make a physician a "student."

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully Submitted.

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AMICUS CURIAE BRIEF

No. 09-837

In the Supreme Court of the United States

Mayo Foundation for Medical Education and Research; Mayo Clinic; and Regents of the University of Minnesota,

Petitioners,

v.

United States,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Kenneth Culp Davis, *Administrative Law Treatise* (2d ed. 1979)..... 24-25, 26, 27

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Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235 (2007)..... 1

Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 Minn. L. Rev. 1537 (2006)..... 1

Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View From Within*, 46 Duq. L. Rev. 323 (2008)..... 10

Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833 (2001)..... 1

Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807 (2002)..... 9

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Juan F. Vasquez, Jr. & Peter A. Lowy, *Challenging Temporary Treasury Regulations*, 3 Hous. Bus. & Tax L.J. 248 (2003)..... 11

INTEREST OF *AMICUS CURIAE*[1]

Amicus is an Associate Professor of Law at the University of Minnesota Law School who teaches and writes in the areas of tax and administrative law. *Amicus* has a longstanding academic interest in the standards of review that courts employ in evaluating the substantive validity of Treasury regulations. *Amicus* has written extensively about judicial review of agency legal interpretations both generally and in the context of tax cases. *See, e.g.*, Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235 (2007); Kristin E. Hickman, *The Need for* Mead, *Rejecting Tax Exceptionalism in Judicial Deference*, 90 Minn. L. Rev. 1537 (2006); Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833 (2001). This Court has previously cited *Amicus*'s work regarding the scope of *Chevron* review. *See United States v. Mead Corp.*, 533 U.S. 218, 230 n.11 (2001). *Amicus* also co-authors an administrative law textbook. *See* Kristin E. Hickman & Richard J. Pierce, Jr., *Federal Administrative Law* (2010).

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[1] Consistent with Supreme Court Rule 37.3(a), *Amicus* files this brief with the written consent of both parties. Consistent with Supreme Court Rule 37.6, *Amicus* hereby certifies that this brief was not authored in whole or in part by counsel for any party and that *Amicus* received no monetary contribution toward the preparation or submission of this brief other than the general financial support of the academic institution with which she is affiliated. The views expressed in this brief are those of *Amicus* and do not necessarily reflect those of her employer.

Consistent with her scholarly interests, *Amicus* submits this brief solely to address issues regarding the standard of review for general authority Treasury regulations raised by the Petitioners and their *amici*. *Amicus* hopes this brief will assist the Court in resolving that important question. *Amicus* disclaims any view regarding either the clarity of Internal Revenue Code § 3121(b)(10) or the reasonableness of Treas. Reg. § 31.3121(b)(10)-2(c) as an interpretation of that statute.

SUMMARY OF THE ARGUMENT

Briefs in this case filed by the Petitioners and *Amicus Curiae* Professor Carlton M. Smith raise two important questions regarding the standard of review by which the Court should assess the substantive validity of Treas. Reg. § 31.3121(b)(10)-2(c). The first question is whether *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1986), or *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979), provides the appropriate evaluative standard for Treasury regulations promulgated pursuant to general authority delegated by § 7805(a) of the Internal Revenue Code, 26 U.S.C. § 7805(a). Assuming that the *Chevron* standard applies, the second question is whether *National Muffler* offers a tax-specific gloss on *Chevron* analysis, requiring a court to invalidate a general authority Treasury regulation that interprets an ambiguous statute as unreasonable if it lacks consistency, contemporaneity, or longevity, or if it was promulgated in reaction to an adverse judicial decision.

Consistent with the Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court should apply the *Chevron* standard of review in evaluating general authority Treasury regulations. *Mead* premises eligibility for *Chevron* deference on whether the agency interpretation carries the force and effect of law. General authority Treasury regulations like Treas. Reg. § 31.3121(b)(10)-2(c) clearly carry the force and effect of law.

The Court's post-*Chevron* jurisprudence has never squarely addressed whether the Court's pre-*Chevron* opinion in *National Muffler* requires a different standard of review for general authority Treasury regulations. Before this case, litigants have failed to raise the question clearly and unequivocally for the Court's consideration. The Court's post-*Chevron* statements regarding deference to general authority Treasury regulations have been mixed and inconclusive. Although the lower courts have exhibited some confusion regarding the question, since the Court's decision in *Mead*, the trend in the circuit courts of appeals has favored *Chevron* review. When viewed within the broader context of the Court's jurisprudence regarding judicial review of agency legal interpretations, it is clear that the *National Muffler* standard is best viewed as synonymous with that of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1940). Just as the Court replaced *Skidmore* with *Chevron* as the standard of review for general authority regulations in other statutes, so the Court should conclude with respect to *National Muffler* and general authority Treasury regulations.

The Court should also resist the invitation to incorporate *National Muffler* factors such as contemporaneity, longevity, consistency, and responsiveness to adverse judicial decisions in assessing the reasonableness or permissibility of a general authority Treasury regulation at *Chevron* step two. The Court's *Chevron* jurisprudence clearly rejects basing a determination that an agency interpretation is unreasonable or impermissible on such factors. Beyond the existence of the Court's decision in *National Muffler*, no reason has been offered, and none exists, for the Court to treat properly promulgated Treasury regulations differently.

ARGUMENT

I. THE COURT SHOULD APPLY THE *CHEVRON* STANDARD OF REVIEW IN EVALUATING TREAS. REG.§ 31.3121(b)(10)-2.

A. The Court Reviews Agency Regulations That Carry The Force Of Law Using The *Chevron* Standard.

For several years now, the Court has recognized two competing standards of review for evaluating the substantive validity of agency legal interpretations. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Christensen v. Harris County*, 529 U.S. 576, 586-87, (2000). The first, articulated by the Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), contains a two-part analysis. First, the Court assesses the clarity of the relevant statute. *Id.* at

842. If the statute's meaning is clear, that is the end of the inquiry, for both agencies and the courts must abide by clearly expressed congressional intent. *Id.* at 842–43. If the statute is ambiguous, however, then the second prong of the *Chevron* standard calls upon reviewing courts to defer to any interpretation thereof that is reasonable or permissible and not arbitrary or capricious.[2] *Id.* at 843.

The second standard that the Court uses in considering challenges to agency legal interpretations is that articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* and its progeny call upon

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[2] *Amicus Curiae* Professor Carlton M. Smith suggests that the Court in *Chevron* and *Mead* articulated an arbitrary and capricious standard for "express" delegations of interpretive authority and a separate reasonableness standard for "implicit" ones. Am. Br. at 12–14 & 14 n.3. He then equates explicit delegations with specific grants and implicit delegations with general grants of rulemaking authority. *See id.* at 14 n.3. Although this argument reflects a creative parsing of the *Chevron* opinion, the Court has not followed this distinction in its post-*Chevron* jurisprudence. The Court has often used the "arbitrary and capricious" phraseology in analyzing general authority regulations under *Chevron* step two. *See, e.g.*, *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996); *Sullivan v. Zebley*, 493 U.S. 521, 528 (1990). The Court has similarly deferred to specific authority regulations as "reasonable" or "permissible" interpretations. *E.g.*, *Household Credit Servs. v. Pfennig*, 541 U.S. 232, 242–43 (2004); *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 501–02, 523 (2002); *National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 333 (2002). In other words, the Court uses these phraseologies interchangeably, with "reasonable" and "permissible" serving as rhetorical equivalents and as the opposite of "arbitrary and capricious."

reviewing courts to consider various factors in determining the degree of deference that is appropriate for a given agency legal interpretation: "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140.

In *United States v. Mead Corp.*, 533 U.S. 218 (2001) this Court adopted a two-part test for evaluating whether a particular agency legal interpretation is eligible for *Chevron* rather than *Skidmore* deference. *Id.* at 226–27. First, the Court asks whether Congress has given the agency in question the authority to bind regulated parties with "the force of law." *Id.* If Congress has made such a delegation, then the Court inquires whether the agency has "exercise[d] . . . that authority." *Id.* Where the answers to both of *Mead*'s questions are affirmative, then *Chevron*'s two-part standard of review applies. *See id.* at 237–38. If the answer to either of *Mead*'s two questions is negative, however, then *Skidmore* offers the appropriate evaluative standard. *Id.* at 237–38.

B. General Authority Treasury Regulations Like Treas. Reg. § 31.3121(b)(10)-2 Carry The Force Of Law.

The Internal Revenue Code (I.R.C.) explicitly grants the Secretary of the Treasury (Treasury) broad authority to interpret its various provisions through rulemaking. Some of these delegations are

conveyed through specific authorizations or mandates to promulgate regulations to fill congressionally-identified statutory gaps. *See, e.g.*, 26 U.S.C. §§ 67(e)(1); 163(e)(3)(B)(ii); 263A(e)(5); 1502. Additionally, numerous specific substantive provisions of the I.R.C. contain more general language giving Treasury the authority to adopt rules as "necessary to carry out the purposes of this paragraph" or "this subsection" or "this section"—sometimes with specific examples, *see, e.g.*, 26 U.S.C. §§ 108(e)(5); 167(e)(6); 170(f)(12)(F)—and other times without. *See, e.g.*, 26 U.S.C. §§ 21(f); 162(m)(5)(H); 1244(e); *see also* N.Y. State Bar Ass'n Tax Section, *Report on Legislative Grants of Regulatory Authority* 2–6 (Nov. 3, 2006) (elaborating types of specific authority grants in the I.R.C.). Finally, I.R.C. § 7805(a) grants Treasury the general rulemaking authority to develop "all needful rules and regulations for the enforcement of" the entirety of Title 26 of the U.S. Code. 26 U.S.C. § 7805(a). Treasury routinely invokes this general authority grant in promulgating all Treasury regulations, even where specific authority may also support its actions. *See* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance With Administrative Procedure Act Rulemaking Requirements*, 82 Notre Dame L. Rev. 1727, 1751, 1754–57 (2007) (documenting empirical analysis showing citation to I.R.C. § 7805(a) in 100% of 232 Treasury regulation projects studied and lack of citation to specific authority even where available).

Established administrative law doctrine holds that properly issued legislative rules carry the force

of law while interpretative rules do not. *See, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979); 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4 (5th ed. 2010). Mimicking (imprecisely) the language of administrative law and the Administrative Procedure Act (APA), *see* 5 U.S.C. § 553, the tax community commonly refers to specific authority Treasury regulations as "legislative" and to general authority Treasury regulations as "interpretative," sometimes shortened as "interpretive." *See, e.g.*, Irving Salem et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 Tax Law. 717, 728 (2004). Both drawing from and contributing to this practice, Treasury claims that the vast majority of its regulations interpreting the I.R.C. are promulgated under the general authority of I.R.C. § 7805(a) and, thus, are interpretative rules exempt from notice-and-comment rulemaking under APA § 553. *See* Internal Revenue Serv., *Internal Revenue Manual* § 32.1.5.4.7.5.1 (stating that "most IRS/Treasury regulations are interpretative, and therefore not subject to these provisions of the APA"); Hickman, *Coloring Outside the Lines*, *supra*, at 1750 (documenting claims of APA inapplicability in more than 80% of 232 Treasury regulation projects). Treasury also claims authority under I.R.C. § 7805(e) to issue legally binding temporary regulations with only post-promulgation notice and comment. *See, e.g.*, *Intermountain Ins. Serv. of Vail, LLC v. Comm'r*, No. 25868-06, 134 T.C. No. 11, 2010 WL 1838297 at *21 (May 6, 2010) (Halpern & Holmes, JJ., concurring). Whether Treasury regulations issued under I.R.C. § 7805(a) are interpretative rules for

purposes of APA rulemaking requirements is a hotly litigated issue at present.[3] Regardless, the Court should not misconstrue either the tax community's use of the interpretative term to describe general authority Treasury regulations or the controversy over Treasury's interpretation of APA rulemaking requirements as indicators that these regulations lack the force of law, for several reasons.

First, while the Court has never identified precisely the characteristics that indicate whether an agency legal interpretation carries the force of law, congressional imposition of penalties for noncompliance would seem conclusive proof of legal force. *See, e.g.*, Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807, 827–30 (2002). Congress has imposed penalties upon taxpayers and tax return preparers who fail to

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[3] In May of this year, two judges from the United States Tax Court rejected the government's position on this question. *See Intermountain Ins. Serv. of Vail, LLC v. Comm'r*, No. 25868-06, 134 T.C. No. 11, 2010 WL 1838297 *17–22 (May 6, 2010) (Halpern & Holmes, J.J., concurring). The issue is pending before several of the circuit courts of appeals. *See, e.g.*, Reply Brief for the Appellant, *Salman Ranch, Ltd. v. Comm'r*, No. 09-9015 (10th Cir. June 1, 2010); Brief for the Appellant, *Grapevine Imports, Ltd. v. United States*, No. 2008-5090 (Fed. Cir. May 25, 2010); Reply Brief for the Appellant, *Comm'r v. M.I.T.A. Partners*, No. 09-60827 (5th Cir. May 6, 2010); Brief for the Appellee, *Home Concrete & Supply, LLC v. United States*, No. 09-2353 (4th Cir. Apr. 30, 2010); Brief for Bausch & Lomb Inc. as Amici Curiae Supporting Appellees, *Salman Ranch, Ltd. v. Comm'r*, No. 09-9015 (10th Cir. Apr. 27, 2010); Brief for Bausch & Lomb Inc. as Amici Curiae Supporting Appellees, *Comm'r v. M.I.T.A. Partners*, No. 09-60827 (5th Cir. Apr. 14, 2010).

comply with general as well as specific authority Treasury regulations. *See, e.g.*, 26 U.S.C. § 6662(a)-(b)(1) (imposing penalties for failure to comply with "rules or regulations"); 26 U.S.C. § 6694(b) (same); *see also* Treas. Reg. § 1.6662-3(b)(2) (defining "rules and regulations" as including "temporary or final Treasury regulations issued under the [Internal Revenue] Code"); Treas. Reg. § 1.6694-3(e) (same).

Second, Treasury, the Internal Revenue Service, tax professionals, taxpayers, and the courts all operate with the understanding that both specific and general authority Treasury regulations are legally binding on the government and taxpayers alike. *See, e.g.*, *Swallows Holding, Ltd. v. Comm'r*, 515 F.3d 162, 168 69 (3d Cir. 2008) (holding that reasonable final Treasury regulations promulgated under I.R.C. § 7805(a) carry the force of law); *Estate of Gerson v. Comm'r*, 507 F.3d 435, 438 (6th Cir. 2007) (noting that both temporary and final general authority Treasury regulations are legally binding); *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 979 (7th Cir. 1998) (recognizing that all Treasury regulations have the force of law); Sheldon I. Banoff, *Dealing with the "Authorities": Determining Valid Legal Authority in Advising Clients, Rendering Opinions, Preparing Tax Returns, and Avoiding Penalties*, 66 Taxes 1072, 1086, 1092 (1988) (noting legal effect of final and temporary Treasury regulations); Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View From Within*, 46 Duq. L. Rev. 323, 327 330 (2008) (recognizing binding effect of all Treasury regulations).

Third, while the Court has declined to declare notice-and-comment rulemaking as an absolute prerequisite for *Chevron* review, the Court has recognized "a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking . . . that produces regulations . . . for which deference is claimed." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Even beyond its delegations of authority to Treasury to promulgate rules backed by sanctions for noncompliance, Congress expressly signaled its intent that Treasury should utilize notice-and-comment rulemaking in promulgating its regulations. Specifically, in response to Treasury's habit of promulgating temporary regulations without notice and comment, Congress enacted I.R.C. § 7805(e) requiring Treasury to accompany temporary regulations with a notice of proposed rulemaking and giving Treasury three years to complete the notice-and-comment process. *See* 26 U.S.C. § 7805(e); *see also* Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 Tax Law., 343, 363-64 (1991) (documenting history of I.R.C. § 7805(e)); Juan F. Vasquez, Jr. & Peter A. Lowy, *Challenging Temporary Treasury Regulations*, 3 Hous. Bus. & Tax L.J. 248, 254 (2003) (describing reasons for adopting I.R.C. § 7805(e)). Additionally, Treasury claims to and does utilize either pre- or post-promulgation notice and comment in adopting most Treasury regulations, irrespective of the authority supporting their issuance. *See, e.g.*, Internal Revenue Serv., *Internal Revenue Manual* §§ 32.1.2.3.3; 32.1.5.4.7.5.1 (declaring Treasury policy of pursuing public notice and comment for all

regulations); Hickman, *Coloring Outside the Lines*, *supra*, at 1749 (documenting that 95% of 232 Treasury regulation projects employed either pre- or post-promulgation notice-and-comment rulemaking). Indeed, Treas. Reg. § 31.3121(b)(10)-2 is a product of notice-and-comment rulemaking. *See* Final Regulation, Student FICA Exception (T.D. 9167), 69 Fed. Reg. 76404 (Dec. 21, 2004), 2005-1 C.B. 261; Notice of Proposed Rulemaking and Notice of Public Hearing, Student FICA Exception, 69 Fed. Reg. 8604 (Feb. 25, 2004).

Finally, the tax community's habit of labeling only those regulations issued under I.R.C. § 7805(a) as issued under general authority neglects the variety of rulemaking authorizations contained within other provisions of the Internal Revenue Code. Historically, delegations of rulemaking power characterized as specific authority in both the I.R.C. and in other statutes tended to instruct government officials to promulgate rules or regulations to fill a congressionally-identified gap in the statute. Hence, the often-cited, paradigmatic example of tax legislative rules are those promulgated pursuant to I.R.C. § 1502, which contains just this sort of specific authority grant. *Compare* Communications Act of 1934, Pub. L. No. 73-416, § 220, 48 Stat. 1064, 1078-80 (codified at 47 U.S.C. § 220) (giving the FCC the authority to adopt uniform accounting rules). Even those members of the tax community who disclaim the applicability of *Chevron* for Treasury regulations issued under I.R.C. § 7805(a) acknowledge the eligibility for *Chevron* deference of specific authority Treasury regulations. *See, e.g.*, Irving Salem et al.,

ABA Section of Taxation Report of the Task Force on Judicial Deference, 57 Tax Law. 717, 738 (2004). As noted above, however, many grants of rulemaking authority contained within substantive provisions of the Internal Revenue Code are linguistically indistinguishable from I.R.C. § 7805(a). A grant of authority, contained in a substantive provision of the I.R.C., to prescribe regulations "as necessary to carry out the purposes of this" section, subsection, or paragraph ultimately extends Treasury no greater rulemaking power than it possesses as a result of I.R.C. § 7805(a). Characterizing the former as legislative (and thus carrying the force of law) and only the latter as interpretative (and thus not) places too much importance on an arbitrary distinction.

In short, the Court should not consider either the tax community's use of the interpretative label or Treasury's interpretation of APA rulemaking requirements as dispositive of whether general authority Treasury regulations carry the force and effect of law. Whatever that standard may mean at the margins for purposes of *Chevron* eligibility, general authority Treasury regulations clearly carry the force and effect of law. In light of the Court's reasoning in *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court should evaluate the substantive validity of Treas. Reg. § 31.3121(b)(10)-2 using the *Chevron* standard of review.

II. THE COURT SHOULD NOT DISREGARD THE *CHEVRON* STANDARD IN FAVOR OF *NATIONAL MUFFLER* REVIEW IN EVALUATING THE VALIDITY OF GENERAL AUTHORITY TREASURY REGULATIONS.

Several years before deciding *Chevron*, in *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472 (1979), this Court assessed the substantive validity of a Treasury regulation issued pursuant to general authority under I.R.C. § 7805(a). In so doing, the Court articulated a series of factors as relevant for purposes of evaluating the regulation:

> In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.

Id. at 477.

A few years later, but again before deciding *Chevron*, this Court again evaluated general authority Treasury regulations in two cases—*Rowan Companies, Inc. v. United States*, 452 U.S. 247 (1981), and *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982). In both *Rowan Companies* and *Vogel Fertilizer*, the Court distinguished general authority Treasury regulations from those issued pursuant to specific authority, and counseled less deferential review using the *National Muffler* standard for the former. *See Rowan Cos.*, 452 U.S. at 253; *Vogel Fertilizer*, 455 U.S. at 24–25.

Amicus Curiae Professor Carlton M. Smith contends that this Court should continue to apply the *National Muffler* standard rather than *Chevron* in evaluating the substantive validity of general authority Treasury regulations. Am. Br. at 3, 40. In fact, this case represents the first time the Court has been asked clearly and unequivocally whether or not *Chevron* replaced *National Muffler* as the standard of review for these interpretations of law. Further, a thorough review of the tax and nontax jurisprudence strongly supports the conclusion that applying *Chevron* rather than *National Muffler* in reviewing general authority Treasury regulations is more consistent with existing jurisprudence.

A. The Court Has Not Explicitly Addressed Whether Or Not *Chevron* Replaced *National Muffler* As The Evaluative Standard For General Authority Treasury Regulations.

Far from consistently counseling *National Muffler* as the appropriate evaluative standard for general authority Treasury regulations, this Court's post-*Chevron* jurisprudence has been inconclusive on the question. In *Cottage Savings Ass'n v. Commissioner*, 499 U.S. 554 (1991), the Court clearly cited and applied *National Muffler*'s multiple factors in evaluating a general authority Treasury regulation. *Id.* at 560–61. Subsequently, in *Boeing Co. v. United States*, 537 U.S. 437 (2003), the Court cited *Cottage Savings* as supporting deference toward a regulation it identified as promulgated under I.R.C. § 7805(a). *Id.* at 448. But in *United States v. Boyle*, 469 U.S. 241 (1985), the Court rejected a taxpayer's challenge to the validity of a general authority Treasury regulation, stating expressly that the regulation was entitled to deference under *Chevron*. *Id.* at 246 n.4. And in *Atlantic Mutual Insurance Co. v. Commissioner*, 523 U.S. 382 (1998), the Court cited and clearly applied the *Chevron*'s two steps in deferring to a Treasury regulation that both parties described on brief as "interpretive." *See id.* at 387–91; *see also* Brief for the Petitioner at 4, *Atlantic Mut. Ins. Co. v. Comm'r*, 523 U.S. 382 (1998) (No. 97-147); Brief for the Respondent at 4, 20, 21, 35, *Atlantic Mut. Ins. Co. v. Comm'r*, 523 U.S. 382 (1998) (No. 97-147).

In *United States v. Burke*, 504 U.S. 229 (1992), after the Court's majority resolved the case without citing or employing either *Chevron* or *National Muffler*, Justice Scalia writing in concurrence cited and applied *Chevron* in concluding that the IRS's interpretation of the statute was unreasonable. *Id.* at 242. Nevertheless, in *Commissioner v. Estate of Hubert*, 520 U.S. 93 (1997), Justice Scalia cited *National Muffler* as supporting judicial deference to a general authority Treasury regulation as a "reasonable interpretation of" the statute. *Id.* at 127–28, 138. In *Newark Morning Ledger Co. v. United States*, 507 U.S. 546 (1993), Justice Souter writing in dissent cited both *Chevron* and *National Muffler* among cases supporting judicial deference to a Treasury regulation. *Id.* at 575–76.

Finally, in a few tax cases, the Court has cited *National Muffler* in dicta more generally as supporting judicial deference to Treasury regulations. In *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989), a case concerning whether tax legislation violated the nondelegation doctrine, the Court cited *National Muffler* as generally supporting judicial deference to the IRS Commissioner's "reasonable interpretations" of the Internal Revenue Code. *Id.* at 222. In *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001), the Court cited *National Muffler* among other cases as counseling deference to reasonable Treasury regulations, *see id.* at 218–19, after which the Court concluded that the regulation did not address the precise question at issue and instead deferred to an interpretation advanced through several revenue rulings as the agency's

"longstanding interpretation of its own regulations." *See id.* at 219 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). *See also United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 840–41 (2001) (Stevens, J., dissenting) (citing *National Muffler* in favor of resolving statutory ambiguity through executive action but acknowledging that no Treasury regulation addressed the issue at hand).

In summary, the Court's precedents appear evenly divided in actually applying *Chevron* versus *National Muffler* to evaluate general authority Treasury regulations. Although citations to *National Muffler* slightly outnumber those to *Chevron* in concurring and dissenting opinions and in dicta in tax cases, these various references are sufficiently mixed to disprove any claim to a definitive conclusion. The reason for the muddle is clear: notwithstanding a disagreement among the circuit courts of appeals, discussed below, that emerged during the 1990s over the standard of review for general authority Treasury regulations, briefing before this Court in tax cases over the past 25 years has failed to present that question squarely. In all of the above cited cases, the parties and *amici* either failed clearly to identify a standard of review or cited one or both of *Chevron* and *National Muffler*, often among other cases, as supporting judicial deference without articulating that the two cases might offer different review standards. Correspondingly, many of the Court's citations to *National Muffler* accompany boilerplate references to deference and reasonableness that the *Chevron* opinion would likewise support. The most

reasonable inference to draw from this history is that the Court has not explicitly addressed whether *Chevron* supplanted *National Muffler* as the standard of review for general authority Treasury regulations.

B. The Trend In The Circuit Courts Of Appeals Favors The *Chevron* Standard For Evaluating General Authority Treasury Regulations.

Prior to the Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), the lower courts exhibited tremendous confusion over the relationship between *Chevron* and *National Muffler*. *See Boeing Co. v. United States*, 258 F.3d 958, 963 (9th Cir. 2001) (acknowledging a split and reserving the question); *Gen. Elec. Co. v. Comm'r*, 245 F.3d 149, 154 n.8 (2d Cir. 2001) (same). At least one circuit – the Sixth – expressly adopted *Chevron* rather than *National Muffler* as the standard of review for general authority Treasury regulations. *See Peoples Fed. Sav. & Loan Ass'n of Sidney v. Comm'r*, 948 F.2d 289, 299, 304 (6th Cir. 1991). Other circuits concluded that *National Muffler* provided the appropriate standard of review and required a lesser degree of deference than *Chevron*. *See, e.g., St. Jude Med., Inc. v. Comm'r*, 34 F.3d 1394, 1400, 1402 (8th Cir. 1994) (abrogated on other grounds by *Boeing Co. v. United States*, 537 U.S. 437 (2003)); *Snowa v. Comm'r*, 123 F.3d 190, 197 (4th Cir. 1997); *Snap-Drape Inc. v. Comm'r*, 98 F.3d 194, 197 (5th Cir. 1996); *see also Schuler Indus., Inc. v. United States*, 109 F.3d 753, 754–55 (Fed. Cir. 1997) (suggesting similar position in case evaluating specific authority Treasury

regulation). Still other circuits found *Chevron* and *National Muffler* to be indistinguishable as a practical matter. *See, e.g., Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 978–83 (7th Cir. 1998).

Since this Court's decision in *Mead*, however, the trend among the circuit courts of appeals has been markedly in favor of *Chevron*. In *Swallows Holding, Ltd. v. Commissioner*, 515 F.3d 162 (3d Cir. 2008), the Third Circuit explicitly addressed the question of whether *National Muffler* retained independent vitality as a standard of review for general authority Treasury regulations after *Chevron*, concluding that it did not and that *Chevron* provides the appropriate standard of review. *See id.* at 167–68. Having previously reserved the question, the Second Circuit seems also to have concluded that *Chevron* rather than *National Muffler* provides the standard of review for evaluating general authority Treasury regulations. *See McNamee v. Dep't of Treasury*, 488 F.3d 100, 105 (2d Cir. 2007). The Sixth Circuit, which already employed *Chevron* to assess general authority Treasury regulations, reaffirmed its conclusion that *Chevron* is the proper standard. *See Estate of Gerson v. Comm'r*, 507 F.3d 435, 437–38 (6th Cir. 2007); *Littriello v. United States*, 484 F.3d 372, 376–78 (6th Cir. 2007); *Hosp. Corp. of Am. & Subs. v. Comm'r*, 348 F.3d 136, 140–41 (6th Cir. 2003). Meanwhile, the Fifth Circuit, which previously utilized the *National Muffler* standard, has acknowledged a need to revisit the question in light of *Mead*. *See Kornman & Assoc., Inc. v. United States*, 527 F.3d 443, 455 n.10 (5th Cir. 2008). Indeed, the Eighth Circuit in this case clearly applied

Chevron, though, like Petitioners, Pet. Br. at 36, that court invoked *National Muffler* in evaluating the reasonableness of Treas. Reg. § 31.3121(b)(10)-2 at *Chevron* step two. *See Mayo Found. for Med. Educ. & Research v. United States*, 568 F.3d 675, 680–81 (8th Cir. 2009).

This trend does not mean that *Mead* has eliminated all confusion over the role of *National Muffler* in evaluating general authority Treasury regulations. For example, the United States Tax Court continues to prefer the *National Muffler* standard for general authority Treasury regulations, only applying *Chevron* in such cases when the circuit court to which a case may be appealed does. *Compare, e.g., Swallows Holding, Ltd. v. Comm'r*, 126 T.C. 96, 130–31 (2006), *vacated* 515 F.3d 162 (3d Cir. 2008), *with New Millennium Trading, L.L.C. v. Comm'r*, 131 T.C. 275, 286–87 (2008). Without acknowledging that *Chevron* might provide an alternative, the Tenth Circuit has continued to apply the *National Muffler* standard, extending at least the impression of a circuit split over the issue. *See Scanlon White, Inc. v. Comm'r*, 472 F.3d 1173, 1175 (10th Cir. 2006). Other circuits that applied *National Muffler* in cases prior to this Court's decision in *Mead*, like the Fourth Circuit and the Federal Circuit, have not revisited the question since. Lower courts would certainly benefit from clarifying instruction from this Court. Nevertheless, in light of *Mead*'s holding basing *Chevron* eligibility on whether an interpretation carries the force of law, and given the obvious legal force of general authority Treasury regulations, it is unsurprising that the lower courts

are according *Chevron* analysis a greater role in these cases.

C. The Court Should Recognize *National Muffler* As Indistinguishable From *Skidmore* Review, And Thus As Replaced By *Chevron* As The Standard Of Review For General Authority Treasury Regulations.

The Court did not pull the *National Muffler* standard from thin air. For decades before deciding *Chevron*, this Court again and again counseled a less deferential, multi-factor standard like that articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), for evaluating agency interpretations of law issued pursuant to tax and nontax general authority grants. Rather than reflecting a unique, tax-specific standard of review, *National Muffler* and its pre-*Chevron* progeny fall squarely within this broader jurisprudence. With *Chevron*, the Court signaled a shift in favor of a more deferential posture in reviewing general authority regulations that carry the force and effect of law. So, too, the Court should conclude with respect to general authority Treasury regulations.

Many regulatory statutes dating from the Progressive and New Deal eras, including but not limited to the early federal income tax laws, included both specific and general authority rulemaking grants. *See, e.g.*, Communications Act of 1934, Pub. L. No. 73-416, §§ 4(i) & 220, 48 Stat. 1064, 1068, 1078 (granting both general and specific authority, respectively, to the Federal Communications

Commission); Revenue Act of 1921 §§ 204(b) (c), 217(e), & 1303, 42 Stat. 227, 231, 244-45 & 309 (giving Treasury and the IRS both specific and general authority. The Court and legal scholars alike considered both tax and nontax regulations promulgated pursuant to specific authority grants as carrying the force and effect of law, and thus legislative in character. *See, e.g., Columbia Broad. Sys. v. United States*, 316 U.S. 407, 416-22 (1942); *Md. Cas. Co. v. United States*, 251 U.S. 342, 349 (1920); Kenneth Culp Davis, *Administrative Rules — Interpretative, Legislative, and Retroactive*, 57 Yale L.J. 919, 928-29 (1948); Robert C. Brown, *Regulations, Reenactment, and the Revenue Acts*, 54 Harv. L. Rev. 377, 384-85 (1941). By contrast, both tax and nontax general authority regulations were considered nonbinding, and thus interpretative. *See, e.g.*, Davis, *Administrative Rules*, *supra*, at 928-30; Stanley S. Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. Pa. L. Rev. 556, 557-58 (1940).

In light of this dichotomy, the Court counseled strong, "controlling" judicial deference to specific authority regulations—legislative rules—interpreting both tax and nontax statutes. *Am. Tel. & Tel. Co. v. United States*, 299 U.S. 232, 236-37 (1936) (applying this standard to a nontax specific authority regulation); *see also, e.g., Atchison, Topeka & Santa Fe Ry. v. Scarlett*, 300 U.S. 471, 474 (1937) (same); *Comm'r v. S. Tex. Lumber Co.*, 333 U.S. 496, 503 (1948) (applying same standard to a specific authority tax regulation); Erwin N. Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398, 401

(1941) (discussing judicial review of specific authority Treasury regulations). In both tax and nontax cases involving general authority regulations—interpretative rules—the Court was less deferential but discussed factors such as contemporaneity, longevity, and consistency, and congressional reenactment that, where present, justified giving agency interpretations respect. *See, e.g.*, *Burnet v. Chi. Portrait Co.*, 285 U.S. 1, 16 (1932) (opining that "great weight is attached to the construction consistently given to a statute by the executive department charged with its administration" even though "[t]he court is not bound by an administrative construction"); *Mason v. Routzahn*, 275 U.S. 175, 178 (1927) (deferring to contemporaneous and long-standing Treasury practice expressed in regulations); *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110, 114–15 (1939) (noting consistency and congressional reenactment in deferring to general authority Treasury regulation); *see also* Griswold, *supra*, at 404–11 (discussing the role of contemporaneity and "long-continuedness" in extending judicial deference to general authority Treasury regulations). The Court's decision in *Skidmore*, counseling deference based on a variety of persuasive factors including consistency, fits squarely within this jurisprudence. *See Skidmore*, 323 U.S. at 140.

In his renowned treatise, Kenneth Culp Davis documented this historical dichotomy between specific and general authority regulations and the degrees of deference extended by the courts. *See* 2 Kenneth Culp Davis, *Administrative Law Treatise* §§ 7.8–7.14 (2d ed. 1979). In *Batterton v. Francis*, 432

U.S. 416 (1977), the Court summarized its past deference jurisprudence similarly, extending strong deference to legislative regulations and lesser deference based on such factors as timing, consistency, and expertise for interpretative regulations under *Skidmore* and other cases. *See id.* at 425–26 & 425 n.9. In calling for a less deferential *National Muffler* review for general authority Treasury regulations, the Court in *Rowan Companies, Inc. v. United States*, 452 U.S. 247 (1981), explicitly linked the *National Muffler* standard to its analysis regarding specific versus general authority regulations in *Batterton v. Francis* as well as to earlier tax cases. *Rowan Cos.*, 452 U.S. at 252–53.

Indeed, the resemblance between the *Skidmore* and *National Muffler* standards is striking. With both standards, the Court relies upon the presence or absence of several contextual factors to ascertain the degree of deference a reviewing court should extend to an agency legal interpretation. In *Skidmore v. Swift & Co.*, the Court identified "the thoroughness evident in [an interpretation's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements" as persuasive factors. *Id.* at 140. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), drawing from both pre- and post-*Chevron* precedents, the Court described *Skidmore* analysis with two slightly different lists of factors: first, "[t]he degree of the agency's care, its consistency, formality, and relative expertness, and... the persuasiveness of the agency's position," *id.* at 228; and then, "thoroughness, logic, and expertness, [and] its fit with prior interpretations." *Id.* at 235.

Historically, congressional reenactment was a consideration in *Skidmore* analysis, but the persuasiveness of this factor has declined in modern jurisprudence. *See* 2 Davis, *Administrative Law Treatise*, *supra*, at § 7:14. Like *Mead*, *National Muffler* offers a marginally different list of relevant considerations from *Skidmore*, but the listed factors are consistent with those that emerge from the broader *Skidmore* jurisprudence: "contemporaneous construction," "the manner in which [the regulation] evolves," "length of time," "reliance," "consistency," and "the degree of [congressional] scrutiny." *National Muffler*, 440 U.S. 472, 477 (1979). *National Muffler* speaks of regulations "harmoniz[ing] with the plain language of the statute, its origin, and its purpose." *Id.* But it is difficult to imagine the Court applying *Skidmore* analysis to defer to a regulation that did not. In short, when viewed in the context of a broader jurisprudence, it is difficult to distinguish *National Muffler* from *Skidmore* analysis.

The 1960s and 1970s saw a virtual explosion of agency rulemaking, with agencies seeking to achieve more policy objectives through general authority regulations. *See* 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 1.6 (5th ed. 2010). The lower courts addressed this expansion of rulemaking activity by characterizing many general authority regulations as legislative rather than interpretative based on what the regulations did rather than the source of their authority. *See, e.g.*, *Nat'l Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 697 (2d Cir. 1975) (concluding that FDA regulations issued pursuant to general authority were legislative rules

because they were legally binding); *see also* 2 Davis, *Administrative Law Treatise*, *supra*, at §§ 7.13, 7.15 (documenting lower court blurring of the distinction between legislative and interpretative rules); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 393–401 (noting declining relevance of the specific versus general authority distinction).

Consistent with this trend, this Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), recognized that exercises of implicit (*i.e.*, general authority) as well as explicit (*i.e.*, specific authority) delegations merit strong deference. *Id.* at 843–44. Whatever the scope of the legislative and interpretative labels in the post-*Chevron* era, as the Court made clear in *United States v. Mead Corp.*, 533 U.S. 218 (2001), the touchstone for *Chevron* eligibility is whether an agency action carries the force of law, not whether the authority exercised is specific or general. *Id.* at 226–27. The regulation at issue in *Chevron* was a general authority regulation promulgated under a grant that strongly resembles I.R.C. § 7805(a). *Chevron*, 467 U.S. at 840–841 (citing Final Rule, Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50766 (Oct. 14, 1981)); *see also* 42 U.S.C. § 7601(a) (granting EPA general authority to promulgate regulations under the Clean Air Act). Hence, this Court has repeatedly extended *Chevron* deference to general authority regulations under a variety of statutes. *See, e.g.*, *National Cable & Telecomm. Ass'n*

v. Brand X Internet Servs., 545 U.S. 969, 980–81 (2005); *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238–39 (2004); *Sullivan v. Everhart*, 494 U.S. 83, 87, 88–89 (1990); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 842–43, 844 (1986); *cf. Gonzales v. Or.*, 546 U.S. 243, 258–59 (2006) (recognizing the Court's application of *Chevron* standard in evaluating exercises of general authority). Whatever the confusion generated in the lower courts by a lack of clarity in the Court's post-*Chevron* tax jurisprudence, no reason has been offered, and none exists, for treating general authority Treasury regulations differently.

In sum, *National Muffler* is merely one of many in the line of pre-Chevron cases that counsels *Skidmore* review for general authority regulations. Every persuasive factor cited by the Court in *National Muffler* can be found in other pre-*Chevron* cases involving general authority regulations under one or another regulatory statute. Thus, to the extent that *Chevron* supplanted *Skidmore* as the evaluative standard for general authority regulations under other statutes, this Court should find that *Chevron* did the same for regulations promulgated under I.R.C. § 7805(a).

III. The Court Should Not Specially Incorporate *National Muffler* Factors Into *Chevron* Step Two Analysis In Tax Cases.

In their opening brief, Petitioners cite *Chevron* as the applicable standard of review, Pet. Br. at 19,

and then construct arguments against Treas. Reg. § 31.3121(b)(10)-2 consistent with *Chevron*'s two-step approach. Nevertheless, in their analysis under *Chevron*'s second step, Petitioners rely upon *National Muffler* for the proposition that Treas. Reg. § 31.3121(b)(10)-2 is unreasonable, among other reasons, for its lack of contemporaneity, longevity, or consistency, and for the fact that Treasury promulgated the regulation in response to adverse interpretations of I.R.C. § 3121 by the courts of appeals. Br. at 36. While such factors may weigh against respecting an agency's interpretation under the review standard articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), for agency actions lacking the force of law, the Court should not employ these factors in the context of *Chevron* analysis as a basis for finding a properly promulgated Treasury regulation unreasonable or impermissible.

The Court has occasionally identified the presence of such factors as additional reasons for deferring to an agency interpretation that it has found otherwise to be eligible for *Chevron* deference. *See, e.g., Barnhart v. Walton*, 535 U.S. 212, 219-220 (2002) (finding an agency interpretation "permissible" under *Chevron* analysis, and offering the interpretation's longevity as an additional reason for extending deference). The Court has declined, however, to find the absence of these factors as a basis for refusing to defer under *Chevron*. *See, e.g., Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740 (1996) (rejecting "antiquity or contemporaneity," as well as a regulation's responsiveness to litigation, as reasons to reject an

interpretation under *Chevron*). And rightly so.

In *Chevron*, the Court recognized that, where Congress has delegated primary interpretive authority to an agency rather than the courts, Congress intended agencies to be able to change their minds—whether due to changed circumstances, based on trial and error, or in response to political elections. *Chevron*, 467 U.S. at 865–66. In *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 969 (2005), the Court reemphasized this premise by concluding that, in the face of statutory ambiguity, an agency action carrying the force and effect of law will be entitled to *Chevron* deference even if it directly contradicts an earlier judicial interpretation. *Id.* at 982.

Rejecting regulations duly promulgated through notice-and-comment rulemaking for their recency or their inconsistency with past interpretations would repudiate the central premise of *Chevron*. Rejecting regulations duly promulgated through notice-and-comment rulemaking for their contradiction with past judicial opinions, where the statute is ambiguous, would repudiate *Brand X* as well. No reason has been offered, and none exists, for the Court to treat tax cases differently from those involving other statutes with respect to these factors.

CONCLUSION

Whether or not the Court ultimately affirms or reverses the Eighth Circuit, the Court should clarify (1) that *Chevron* rather than *National Muffler* provides the appropriate standard for reviewing the substantive validity of general authority Treasury regulations like Treas. Reg. § 31.3121(b)(10)-2 and (2) that *National Muffler* factors should play no greater role in *Chevron* step two analysis in tax cases than in nontax cases.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

MAYO FOUNDATION FOR EDUCATION AND RESEARCH; MAYO CLINIC; AND THE REGENTS OF THE UNIVERSITY OF MINNESOTA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* LOYOLA UNIVERSITY MEDICAL CENTER IN SUPPORT OF PETITIONER

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OTHER AUTHORITIES

69 Fed. Reg. 76,404 (Dec. 21, 2004) 5

ACGME Common Program Requirements, *available at* http://acgme-2010standards.org/pdf/Proposed_Standards.pdf 10, 11, 12

ACGME Common Program Requirements, effective July 1, 2007, *available at* http://www.acgme.org/acWebsite/dutyhours/dh_dutyhourscommonpr07012007.pdf 12

ACGME Data Resource Book Academic Year 2008 – 2009, *available at* http://www.acgme.org/acWebsite/dataBook/2008-2009_ACGME_Data_Resource_Book.pdf 14, 15

AMA-Medical Student Debt, *available at* http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/medical-student-section/advocacy-policy/medical-student-debt.shtml 8, 9

American Association of Medical Colleges, *Survey of Resident / Fellow Stipends and Benefits 2009, available at* http://www.aamc.org/data/stipend/2009_stipendreport.pdf 8

TABLE OF AUTHORITIES (continued)

Page(s)

Center for Workforce Studies, American Association of Medical Colleges, *The Complexities of Physician Supply and Demand: Projections Through 2025* (Nov. 2008), *available at* http://services.aamc.org/publications/showfile.cfm?file=version122.pdf 9

CMS Form 855, *available at* http://www.cms.gov/cmsforms/cmsforms/itemdetail.asp?itemid=CMS019477 15

Federation of State Medical Boards, *State Requirements for Initial Medical Licensure*, (July 2010), *available at* http://www.fsmb.org/usmle_eliinitial.html .. 14, 15

Jesuit Health Sciences and the Promotion of Social Justice (Jos V.M. Welie and J. Kissell, eds., 2005) 17

John W. O'Malley, *The First Jesuits* (1993) 16

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STATEMENT OF INTEREST[1]

Loyola University Medical Center ("LUMC"), part of the Loyola University Health System, is the teaching hospital of the last fully-integrated Catholic Jesuit academic medical center in America. Working with its affiliate, the Stritch School of Medicine of Loyola University Chicago, and with its 700-member faculty (collectively "Loyola"), LUMC annually educates in excess of 600 graduate medical students (medical residents),[2] treats patients, and conducts medical research. All entities are, or are components of, Illinois not-for-profit corporations.

The LUMC mission statement says:

> Loyola University Health System is committed to excellence in patient care and the education of health professionals. We believe that our Catholic heritage and Jesuit traditions of ethical behavior, academic distinction, and scientific research lead to new knowledge and advance our healing mission in the communities we serve. We believe that thoughtful stewardship,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* made such a monetary contribution. Letters from the parties consenting to the filing of this *amicus* brief have been filed with the Clerk of the Court.

[2] LUMC also educates many other students, including (for example) nurses and emergency medical technicians.

> learning and constant reflection on experience improve all we do as we strive to provide the highest quality health care. We believe in God's presence in all our work. Through our care, concern, respect and cooperation, we demonstrate this belief to our patients and families, our students and each other. To fulfill our mission we foster an environment that encourages innovation, embraces diversity, respects life, and values human dignity. We are committed to going beyond the treatment of disease. We also treat the human spirit.

LUMC Mission Statement, *available at* http://www.loyolamedicine.org/Learn_About_Us/Mission_Brand/index.cfm (last visited August 12, 2010).

LUMC timely filed with the Internal Revenue Service ("IRS") its original Forms 941, Employer's Quarterly Federal Tax Returns. On these Forms 941, LUMC erroneously reported that certain amounts it paid its medical residents were wages subject to the Federal Insurance Contributions Act ("FICA" or "Act") under 26 U.S.C. §§ 3111(a) and (b) and 3101(a) and (b). Thereafter, LUMC timely filed claims for refund of the FICA taxes paid on behalf of itself and its resident physicians on the basis that those residents were students entitled to the exemption in 26 U.S.C. § 3121(b)(10). In 2009, LUMC filed suit in the United States District Court for the Northern District of Illinois against the United States to obtain these refunds under Case Number 1:09-cv-04977. On March 2, 2010, the IRS issued a public concession that residents were students not subject to FICA tax for the tax periods ending before April 1, 2005, the

effective date of the new regulation that is the subject of this case (Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii)). Due to the government's concession, LUMC and the U.S. Department of Justice, Tax Division executed and filed a stipulation to dismiss only the portion of the case dealing with the period before the effective date of the new regulation. LUMC's lawsuit for the new regulation period remains pending in the U.S. District Court for the Northern District of Illinois. This Court's decision in this case will likely have a dispositive effect on the remainder of LUMC's lawsuit and its ability to recover the FICA tax paid on behalf of LUMC and its residents for periods beginning after April, 2005.

Petitioner has capably marshaled the arguments against the IRS's position, and this brief will not repeat those arguments. Nonetheless, as a Jesuit educational institution, LUMC is uniquely positioned to challenge the IRS's conception that a medical resident's service ceases to be predominantly educational once the resident works 40 hours per week.

SUMMARY OF ARGUMENT

After completing four years of medical school and receiving an M.D. degree, physicians cannot receive a permanent medical license from the Illinois Department of Professional Regulation until they complete a course of postgraduate medical education, commonly known as an internship and/or a residency. LUMC trains approximately 600 medical residents per year in dozens of medical specialties. These trainees work long hours, nights, weekends and holidays in pursuit of their education. Such long

hours do not make them employees – they remain students being trained in medicine within the Jesuit educational tradition. The IRS's raising the bar of a 40-hour per week beyond which medical residents cease to be students for purposes of the student exemption from FICA is contrary to the plain meaning of 26 U.S.C. § 3121(b)(10) and is arbitrary and capricious.

ARGUMENT

The Federal Insurance Contributions Act requires both employees and employers to pay Social Security and Medicare Insurance taxes upon "wages . . . with respect to employment." 26 U.S.C. § 3101, 3111. "Employment" is in turn defined to mean any "service, of whatever nature, performed . . . by an employee for the person employing him" in the United States (or in other specially defined circumstances). *Id.* § 3121(b). The Act enumerates exceptions from the definition of covered employment, including "service performed in the employ of . . . a school, college, or university . . . by a student who is enrolled and regularly attending classes at such school, college, or university." *Id.* § 3121(b)(10).

The IRS has long interpreted subsection (b)(10) to encompass not all student employment, but only service that is "incident to and for the purpose of pursuing a course of study." Treas. Reg. § 31.3121(b)(10)-2(c) (2004); *see* Pet. App. 42a n.10 (noting that this approach has been reflected in IRS regulations since shortly after Congress enacted the student-employment exemption in the 1939 Social

Security Act amendments). Under its prior regulation,

> [t]he status of the employee as a student performing the services shall be determined on the basis of the relationship of such employee with the organization for which the services are performed. An employee who performs services in the employ of a school, college, or university, as an incident to and for the purpose of pursuing a course of study at such school, college, or university has the status of a student in the performance of such services.

Treas. Reg. § 31.3121(b)(10)-2(c) (2004).

In late 2004, however, after court decisions holding that services performed by medical residents were incident to a course of study, *see, e.g.*, *Minnesota v. Apfel*, 151 F.3d 742 (8th Cir. 1998) (Social Security regulation); *United States v. Mayo Foundation for Medical Education and Research, et al.*, 282 F. Supp. 2d 997 (D. Minn. 2003) (IRS regulation), the IRS amended its regulation to overrule those decisions in the tax context. Student FICA Exception, 69 Fed. Reg. 76,404, 76,408-09 (Dec. 21, 2004). The IRS converted its "relationship" test into a general rule. The IRS retained the requirement that "[a]n employee's services must be incident to and for the purpose of pursuing a course of study in order for the employee to have the status of a student," and declared that "[t]he educational aspect of the relationship between the employer and the employee,

as compared to the service aspect of the relationship, must be predominant in order for the employee's services to be incident to and for the purpose of pursuing a course of study." Treas. Reg. § 31.3121(b)(10)-2(d)(3)(i). But the IRS declared a categorical exception from that test: the services of a student whose normal work schedule is 40 hours or more per week are "not incident to and for the purpose of pursuing a course of study," and at that threshold the person is considered a "full-time employee" and not a student. *Id.* § 31.3121(b)(10)-2(d)(3)(iii).

LUMC does not contest that, in its general rule, the IRS has properly interpreted the statutory term "service performed in the employ of . . . a school, college, or university . . . by a student," 26 U.S.C. § 3121(b)(10), to be limited to those students whose employment service is "incident to and for the purpose of pursuing a course of study" and for whom the "educational aspect" of the student's relationship with the university is "predominant." Treas. Reg. § 31.3121(b)(10)-2(d)(3). The statutory student exception of subsection 3121(b)(10) was not meant to encompass any university employee who happens to take regular classes.

But if the plain meaning of subsection (b)(10) is to exempt school employment of students when the predominant purpose of the relationship is educational, then medical residents should be exempt whenever predominance of an educational purpose can be proven (as it invariably can be). Moreover, even if *arguendo* the statutory text is ambiguous, the

IRS's amended regulation – which provides categorically that the services of a student whose normal work schedule is 40 hours or more per week are "not incident to and for the purpose of pursuing a course of study," Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) – is not entitled to deference because it is unreasonable. *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). It is starkly unreasonable to decree that the educational aspect of the student-university relationship is *never* predominant in *any* circumstances when the student receives a stipend for 40 hours per week or more of service. Such an inflexible quantitative rule has no rational basis when the service is intrinsic to the student's course of study and inherently educational, as is true of medical residency. Medical residents must devote more than 40 hours per week to practical education in the healing arts under the supervision of attending physicians, which is generally required in order to learn about the evolution of a patient's disease or (for example) to participate in surgery. Residency is not a 9-to-5 job – it is often an around-the-clock lesson. The IRS's 40-hour rule effectively and arbitrarily means that by devoting more time to their education, residents cease to be students. Contrary to the IRS's interpretation, medical residents are in the heartland of the section 3121(b)(10) exemption that Congress created to immunize true students (and the schools and universities that create student employment to enable their education) from FICA taxation. This Court should reverse the judgment below.

I. Aspiring Physicians Sacrifice Nearly A Decade Of Their Lives To Medical Education.

Residents are students. Moreover, they are students whose educations are costly; the average debt of indebted medical school graduates was $156,456 in 2009. *See* AMA-Medical Student Debt, *available at* http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/medical-student-section/advocacy-policy/medical-student-debt.shtml (last visited August 12, 2010). No mere "employee" with over $150,000 of medical school debt would work up to 80 hours per week (up to 88 in neurosurgery) and give up nights, weekends and holidays in exchange for $45,000-$60,000 per year.[3] The remuneration permits the education – it is not the purpose of the endeavor.

This is exactly the kind of employment that Congress intended to exempt from FICA taxation: school employment that enables the student to finance his education. FICA taxation is significant in amount. The 7.625% employer share that the medical school pays under the government's approach absorbs funds that would otherwise be used for better

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[3] The mean first-year stipend for a first post-MD year stipend was $47,458. American Association of Medical Colleges, *Survey of Resident/Fellow Stipends and Benefits 2009*, at 4, *available at* http://www.aamc.org/data/stipend/2009_stipendreport.pdf (last visited August 12, 2010). The stipend increases roughly $2,000 per year in ensuing years of the residency. *Id.* at 4 (Table 1).

medical education or patient care. The equivalent "employee" share paid by the resident means that there is that much less money to make ends meet, and at the margin some medical residents cannot withstand a wage loss of nearly 8%. The more financial pressure that is loaded upon medical residents, the more likely that (1) some residents may moonlight, potentially compromising their education and patient care; (2) residents will gravitate to higher paying specialties, rather than primary care; and (3) persons of limited means will choose to forego medical education to pursue fields which do not require such prolonged periods of poorly paid apprenticeships. *See AMA-Medical Student Debt*, *supra*. The IRS's imposition of FICA taxes upon medical residents is not only contrary to law, but it is also particularly detrimental when an acute physician shortage is on the horizon. *See* Center for Workforce Studies, American Association of Medical Colleges, *The Complexities of Physician Supply and Demand: Projections Through 2025* (Nov. 2008), *available at* http://services.aamc.org/publications/showfile.cfm?file=version122.pdf (last visited August 12, 2010) (projecting a shortage of between 125,000 and 159,300 physicians by 2025). Congress did not intend to tax income from school employment that is necessary to allow the student to pursue his or her education.

II. The Medical Resident's Employment Is Intrinsic To The Resident's Education.

Medical residency employment is even more clearly within the subsection (b)(10) exemption than

most forms of student employment. Not only is it "incident to and for the purpose of pursuing a course of study," but it is in fact intrinsic to the resident's course of study. The essence of medical resident education is clinical hands-on patient care, supervised by attending physicians. This is the very educational care that a teaching hospital or medical school supports through a stipend. Indeed, what the IRS seeks to exclude from the subsection (b)(10) exemption is the experiential education that state governments require before a doctor can practice medicine, and that the federal government requires before permitting reimbursable Medicare services.

A. The Essence Of Medical Residency Education Is The Direct, Supervised Patient Care That The Resident Provides.

Progressive experience in and responsibility for patient care is the essence of medical residency education. The Accreditation Council on Graduate Medical Education ("ACGME") is a private, non-profit body that accredits and monitors the educational effectiveness of residency programs. It does this through both common and specialty-specific requirements, as well as periodic site visits. The proposed introduction to the ACGME program requirements summarizes residency:

> Residency is an essential dimension of the transformation of the medical student to the independent practitioner along the continuum of medical education. It is physically, emotionally and intellectually demanding, and requires longitudinally-

concentrated effort on the part of the resident.

The specialty education of physicians to practice independently is experiential, and necessarily occurs within the context of the health care delivery system. Developing the skills, knowledge, and attitudes leading to proficiency in all the domains of clinical competency requires the resident physician to assume personal responsibility for the care of individual patients. For the resident, the essential learning activity is interaction with patients under the guidance and supervision of faculty who give value, context, and meaning to those interactions. As residents gain experience and demonstrate growth in their ability to care for patients, they assume roles that permit them to exercise those skills with greater independence. This concept – graded and progressive responsibility – is one of the core tenets of American graduate medical education. Supervision in the setting of graduate medical education has the goals of assuring the provision of safe and effective care to the individual patient; assuring the development of the skills, knowledge, and attitudes in the resident required to enter the unsupervised practice of medicine; and establishing a foundation for continued professional growth.

ACGME Common Program Requirements, Introduction, *available at* http://acgme-

2010standards.org/pdf/Proposed_Standards.pdf (last visited August 12, 2010).

Accordingly, ACGME requires each residency program to have an educational curriculum that contains (1) overall educational goals for the program; (2) competency-based goals and objectives for each residency assignment at each level of training; and (3) delineation of resident responsibility for patient care, including a plan for progressive responsibility for patient management and supervision of residents over the continuum of the program. In addition, all medical residency programs must comply with certain ACGME "competencies," which include ensuring that residents demonstrate (1) medical and clinical knowledge and the ability to apply this knowledge to patient care; (2) the development of skills to investigate and evaluate care of patients; (3) interpersonal and communication skills to be able to exchange information with patients, their families, and other health care professionals; and (4) a commitment to carrying out professional responsibilities and ethical principles. ACGME Common Program Requirements, effective July 1, 2007, § IV, *available at* http://www.acgme.org/acWebsite/dutyhours/dh_dutyhourscommonpr07012007.pdf (last visited August 12, 2010).

Completion of a course of study in an ACGME accredited program is a prerequisite for a physician becoming "board certified" in a particular specialty. The specific standards for ACGME accreditation vary by specialty, but, as a general rule, it is necessary for an ACGME program to offer residents a sufficient number of patients with diverse disease

presentations in their designated specialty to assure a well-rounded education in the specialty.

There are over 400 ACGME-accredited programs in Illinois. LUMC operates over 43 such programs in Maywood in the specialties of urology; general surgery; vascular surgery; thoracic surgery; diagnostic radiology; radiation oncology; dermatology; vascular neurology; surgical critical care; pain medicine; anesthesiology; cardiovascular disease; family medicine; internal medicine; gastroenterology; endocrinology, diabetes and metabolism; infectious disease; nephrology; rheumatology; clinical cardiac electrophysiology; interventional cardiology; hematology and oncology; pulmonary disease and critical care medicine; neurological surgery; neurology; clinical neurophysiology; nuclear medicine; orthopedic surgery; ophthalmology; obstetrics and gynecology; otolaryngology; anatomic and clinical pathology; cytopathology; hematology; pediatrics; neonatal-perinatal medicine; plastic surgery; physical medicine and rehabilitation; psychiatry; adult cardiothoracic anesthesiology; geriatrics; and hand surgery.

LUMC does not employ medical residents to support this many accredited specialty programs to generate profits; rather, it supports these programs to educate the residents, consistently with its mission. For example, it would probably be impossible to deliver enough babies to cover the total cost of the obstetrics program. Yet students must complete a course in delivering babies in order to be fully trained – even if they do not ultimately become obstetricians. The educational aspect of the medical resident-academic hospital relationship far

predominates over the employment aspect. LUMC pays its residents limited remuneration to enable them to pursue this education, and Congress did not intend such payments to be subject to FICA taxation.

B. Postgraduate Medical Education Is Necessary For Both State Licensing And Federal Medicare Practice.

What the IRS refuses to recognize as predominantly educational is the very education that the States require in order to license physicians to practice medicine. In Illinois and every other state, completion of medical school and receipt of an M.D. degree does not entitle a new physician to a permanent medical license. *See* Federation of State Medical Boards, *State Requirements for Initial Medical Licensure* (July 2010), *available at* http://www.fsmb.org/usmle_eliinitial.html (last visited August 12, 2010) ("FSMB Requirements"). It is only sufficient to allow a new physician to gain a temporary license to continue his or her education as a medical resident. New medical graduates, who have not been permanently licensed in another state, must complete two years of additional education to earn a permanent license. 225 ILCS 60/11(A). Ironically, two years of residency is less than the minimum requirement for virtually all of the more than 8,000 specialty training programs recognized by ACGME, including family medicine, internal medicine and obstetrics and gynecology (disciplines frequently called "primary care"). *See* ACGME Data Resource Book Academic Year 2008 – 2009, at 30-32, *available at*

http://www.acgme.org/acWebsite/dataBook/2008-2009_ACGME_Data_Resource_Book.pdf (last visited August 12, 2010).

Moreover, Medicare effectively requires medical residency education to serve patients. Physicians must have a Medicare provider number to bill the Federal government for treating one of the 45 million Medicare beneficiaries. The Centers for Medicare and Medicaid Services ("CMS") looks to State law to determine whether a physician has legal authorization to practice medicine. In order to obtain a provider number, practitioners must list their medical school and residency training program on CMS Form 855, *available at* http://www.cms.gov/cmsforms/cmsforms/itemdetail.asp?itemid=CMS019477 (last visited August 12, 2010), as well as the state medical license number. Every state in the Union requires at least one year of postgraduate education before it will issue a permanent medical license, and many require more. *See* FSMB Requirements, *supra*.

C. The IRS's 40-Hour Rule Leads To Arbitrary Distinctions.

Medical residents put in long hours not for the pay, but because their education demands it. A resident must observe the progression of a patient's disease, which cannot be achieved by minding the clock. A medical resident has to develop the capacity to serve patients capably even when physically fatigued. Moreover, the problems of human health are so variegated that few students can take a "part-time" approach and emerge as a competent doctor in the few years allotted to medical residency.

The IRS's 40-hour rule is arbitrary. At 39 hours of education per week, a young doctor is a student, but at 41 hours, is she an employee? Neither the person nor the character of activity is different. There is no doubt that the medical resident who puts in 60 or 80 hours is more skilled, better educated, and ultimately the better doctor than a resident who would put in 30 hours. The IRS's rule that a medical resident ceases to be a student the more time that she devotes to her medical education is illogical. She remains a student, simply a more industrious one and consequently a more experienced medical practitioner.

D. The Jesuit Mission Underscores The Arbitrariness Of The IRS's Stance.

The student-exemption of subsection (b)(10) does not apply any differently to Jesuit hospitals, but the mission and tradition of Jesuit education casts the error of the IRS's position in high relief.

The Society of Jesus, whose members are known as Jesuits, was founded by Ignatius of Loyola in the 16th century. From the inception of the order, Jesuit ministry has emphasized education and the founding of schools, as well as medical care. *See* Robert J. Araujo, *Legal Education and Jesuit Universities: Mission and Ministry of the Society of Jesus*, 37 Loy. L. Rev. 245, 245-46 (1991-1992); John W. O'Malley, *The First Jesuits* 171-72 (1993) (describing 16th century hospital service of Jesuits). By the early 17th century, the University of Pont-à-Mousson in France became the first Jesuit university to have established a medical school. *See* Jos V.M. Welie, *Ignatius of Loyola on Medical Education Or: Should Today's Jesuits Continue to Run Health Sciences Schools?*,

Early Science and Medicine, Vol. 8, No. 1 25-43, 35 (2003).

LUMC continues to educate residents according to the ideals of the Society of Jesus. It emphasizes five principles of Jesuit education: (1) a passion for quality, (2) a commitment to lifelong learning, (3) a focus on ethics and values, (4) a relationship between education and the religious experience, and (5) a person-centered approach. These principles embody "the heritage and mission of health care and medical education in the Jesuit tradition." *See* Loyola University Health System – Mission & Ministry, *available at* http://www.luhs.org/depts/ministry/education.htm (last visited August 12, 2010).

After 450 years, the Jesuit commitment is undiminished. *See* generally *Jesuit Health Sciences and the Promotion of Social Justice* (Jos V.M. Welie and J. Kissell, eds., 2005). Loyola and the other Jesuit teaching hospitals maintain residency programs, and fund the participation of residents in patient care, without regard to whether such education is profitable. They do so because their mission is to educate. Nor do they set an arbitrary number of hours per week for their educational mission or require their residents to work fewer hours than are necessary to learn how to be highly skilled doctors. Jesuit medical education seeks excellence, and the pursuit of excellence requires time and effort.

The IRS cannot interpret the term "student" in subsection 3121(b)(10) to mean a person whose educational relationship with the school or university

is predominant, and yet apply a categorical 40-hour workweek test to exclude those very students.

CONCLUSION

For all the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH, et. al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF TAX PROFESSOR CARLTON M. SMITH AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus is interested in this case because it involves the review of an interpretive Treasury Regulation. *Amicus* is a graduate of Harvard Law School. From 1981 to 1983, he served as a law clerk to Hon. Arthur L. Nims, III of the United States Tax Court. From 1983 to 1999, *amicus* was first an associate and then a partner conducting a tax controversy practice in New York City at Roberts & Holland, LLP. In 2000, *amicus* worked briefly for the Internal Revenue Service Chief Counsel's Office in its National Office.

Since 2003, *amicus* has been the Director of the Benjamin N. Cardozo School of Law Tax Clinic, where he supervises students representing low-income taxpayers in disputes with the Internal Revenue Service. Some of those disputes involve the validity of Treasury Regulations. *See Iljazi v. Commissioner*, T.C. Summary Op. 2010-59 (following Tax Court precedent in holding the 2-year period to request relief under 26 C.F.R. §1.6015-5(b) invalid as

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, the parties have consented to the filing of this brief.. See docket entries for July 29, 2010 and August 6, 2010. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus* or Yeshiva University has made a monetary contribution to the preparation and submission of this brief. Yeshiva University, of which the Benjamin N. Cardozo School of Law is a component, is an employer of *amicus*. *Amicus* wishes to acknowledge the assistance of commentator Mark E. Berg in reviewing this brief.

to requests for equitable relief under 26 U.S.C. §6015(f)). *Amicus* is currently a Clinical Associate Professor of Law at the Benjamin N. Cardozo School of Law. Since 2007, *amicus* has also been teaching, as an adjunct professor, the course "Civil Tax Controversies and Litigation" in the Graduate Tax Program at New York University School of Law. In his courses at both schools, *amicus* teaches his students about judicial review of Treasury Regulations.

Amicus does not represent any particular client in filing this brief. Nor does *amicus* file this brief on behalf of either of his employers, who may, in other areas of their respective universities' medical schools, pay medical residents. *Amicus* simply wishes to ensure that the Court is aware of the substantial confusion among the Courts of Appeals concerning the applicable standard in assessing the validity of tax regulations issued under the general authority granted to the Treasury Department under 26 U.S.C. §7805(a) ("interpretive tax regulations"). That confusion, which stems from a misreading of this Court's clear precedents in this area by certain Courts of Appeals, was not discussed in the Eighth Circuit's opinion, the petition for *certiorari*, any of the *amicus* briefs filed in support of the petition for *certiorari*, or in the merits brief just filed by the Mayo Foundation. *Amicus* submits this brief primarily to urge the Court to clarify that the standard set out in *National Muffler Assn. v. United States*, 440 U.S. 472 (1979) -- relied on by the Eighth Circuit in this case, but ignored by several other Courts of Appeals -- remains the applicable standard for assessing the validity of interpretive tax

regulations. Further, *amicus* asks the Court to clarify that the higher level of deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *United States v. Mead Corp.*, 533 U.S. 218 (2001), is applicable to tax regulations only when Congress specifically delegates to the Treasury Department regulatory authority regarding a particular tax matter, as contrasted with the general delegation of authority to promulgate interpretive tax regulations. Finally, *amicus* urges the Court to address the impact of *National Cable & Telecomms. Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005), on the promulgation of tax regulations -- an important opinion of this Court that was barely mentioned by the Eighth Circuit and is not even mentioned at all in the brief filed by the Mayo Foundation.

SUMMARY OF ARGUMENT

In evaluating the validity of an interpretive tax regulation, the Court should continue its longstanding practice of applying the standard of reasonableness set out in *National Muffler Assn. v. United States*, 440 U.S. 472 (1979), which includes an evaluation of the manner in which the regulation evolved and the contemporaneity, longevity, and consistency of the rule set forth in the regulation in question, rather than the higher level of deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *United States v. Mead Corp.*, 533 U.S. 218 (2001) . Under the *National Muffler* reasonableness standard, *amicus* respectfully submits that the regulation in question in this case should be held

invalid. Moreover, while there is a strong argument that *National Cable & Telecomms. Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005), is distinguishable where, as here, the agency issuing the regulation in question was a party to the litigation giving rise to the prior judicial interpretation of the underlying statute, the regulation in question is also invalid under the standard set forth in that case, since several Courts of Appeals had previously held that the underlying statute unambiguously provides to the contrary.

ARGUMENT

I. THIS COURT'S RULINGS ON THE ISSUE OF JUDICIAL DEFERENCE TO REGULATIONS

When the instant case is decided by this Court, it is almost inevitable that this Court will (as did the Eighth Circuit in this case) cite either one or both of two important opinions of this Court concerning judicial deference to agency regulations, *National Muffler Assn. v. United States*, 440 U.S. 472 (1979), which dealt with interpretive tax regulations, and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which did not. Although this Court, both before and after *Chevron*, has made it clear that the standard of reasonableness set out in *National Muffler* is to be applied to review interpretive tax regulations, the Courts of Appeals are in a state of confusion on the subject of whether *National Muffler* or *Chevron* governs the judicial deference to be given to interpretive tax regulations, and much ink has been

spilled by commentators on this subject. *Amicus'* primary purpose in writing this brief is to alert the Court to this continuing and widening confusion in the lower courts. An *amicus* brief is too short to fully elucidate this subject, but *amicus* hopes to point the Court to some principal sources of argument and a proposed answer.

This case also involves at least the third occasion in two decades that the Treasury Department has promulgated a tax regulation under the general authority of 26 U.S.C. §7805(a) with the explicit purpose of overruling Courts of Appeals that consistently reached contrary taxpayer-favorable interpretations. The prior two occasions are:

1) 26 C.F.R. §1.882-4(a)(3)(i), adopted by T.D. 8322, 55 Fed. Reg. 50827 (December 11, 1990) -- held valid in *Swallows Holding, Ltd. v. Commissioner*, 515 F.3d 162 (3d Cir. 2008), after being held invalid by the United States Tax Court in 126 T.C. 96 (2006); and

2) 26 C.F.R. §§301.6229(c)(2)-1T and 301.6501(e)-1T, adopted by T.D. 9466, 74 Fed. Reg. 49321 (Sept. 28, 2009) -- held invalid in *Intermountain Ins. Serv. of Vail, LLC v. Commissioner*, 134 T.C. No. 11 (May 6, 2010).

Amicus believes that in the area of interpretive tax regulations, this Court should hold

that the rule of *National Cable & Telecomms. Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005), does not apply to allow the government to adopt a regulation that produces more government revenue in the face of consistent Circuit Court interpretation to the contrary. In circumstances like those, Separation of Powers concerns dictate that the Executive should seek a statutory amendment, rather than assert primacy over the Judiciary by regulation.

Before discussing what the lower courts have recently said about interpretive tax regulations, a little background on this Court's jurisprudence on the standards by which the validity of regulations (tax and otherwise) are to be tested is in order:

Although one could go back much farther in this Court's opinions, for simplicity, *amicus* starts with the Court's 1979 opinion in *National Muffler*.[2] In that opinion, this Court evaluated an interpretive tax regulation promulgated under the general authority of 26 U.S.C. §7805(a), which provides: "[T]he Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in

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[2] *National Muffler* was far from the first case of this Court reviewing an interpretive tax regulation, but it has been described as providing the "fullest statement of this [Court's] reasonableness test" applied to tax regulations. See "ABA Section of Taxation Report of the Task Force on Judicial Deference", 57 *Tax Lawyer* 717, 721 (Spring 2004).

relation to internal revenue." Not all regulations issued by the Treasury Department are "interpretive". Some regulations are considered "legislative" because specific wording in the Internal Revenue Code directs or specifically authorizes the Treasury Department to promulgate them. For example, in the employment tax provision at issue in this case, there is a subsection that contemplates issuance of "legislative" regulations to govern agreements entered into between the Internal Revenue Service and foreign affiliates of American employers. 26 U.S.C. §3121(l)(1) ("the American employer will comply with such regulations relating to payments and reports as the Secretary may prescribe to carry out the purposes of this subsection."). By contrast, the regulation at issue in the current case is considered "interpretive" because it was not one promulgated under any such specific grant of regulatory authority, but rather was promulgated pursuant to the general authority of 26 U.S.C. §7805(a). For an excellent discussion of "legislative" versus "interpretive" regulations (and a taxonomy of the various kinds of "legislative" regulation authorizations in the Internal Revenue Code), see Mark E. Berg, "Judicial Deference to Tax Regulations: A Reconsideration in Light of *National Cable, Swallows Holding*, and Other Developments", 61 *Tax Lawyer* 481, 485-490 (Winter 2008).

It should also be noted that the words "legislative" and "interpretive" are used differently as addressed to Treasury regulations than those terms are used under the Administrative Procedure Act. *Id.* at 486-487. An American Bar Association

Tax Section Task Force summarizes the situation as follows:

> The Administrative Procedure Act (APA) defines a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. §551(4). The APA requires agencies to follow notice-and-comment procedures when they promulgate rules that bind the public. 5 U.S.C. §553(b). In administrative law generally, such binding rules are known generally as legislative rules or regulations. The APA explicitly exempts from the notice-and-comment requirements "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." *Id.* In the case of regulations, tax law has used a different basis to distinguish between legislative and interpretive rules. In tax, legislative regulations are those promulgated pursuant to a specific grant of authority under some provision of the Internal Revenue Code. Interpretive regulations are those promulgated under the general authority of section 7805(a), which directs the Secretary of the Treasury "to prescribe all needful rules and regulations for the enforcement of this title." In promulgating interpretive regulations, the IRS invariably specifies that "section 553(b) of the Administrative

> Procedure Act (5 U.S.C. § 553) does not apply to these regulations." At the same time, however, it is the customary practice of the IRS to follow notice-and-comment procedures for interpretive regulations.

"ABA Section of Taxation Report of the Task Force on Judicial Deference", 57 *Tax Lawyer* 717, 728 (Spring 2004) (hereinafter, "ABA Task Force") (footnotes omitted).

In *National Muffler*, the issue was the validity of an interpretive tax regulation which, according to the complaining organization, appeared to cut back on the meaning of the statutory term "business league" as used in 26 U.S.C. §501(c)(6). Prior to upholding the regulation, this Court set forth a list of factors that it would consider in determining the reasonableness of the regulation in such a case:

> In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree

> of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.

National Muffler, 440 U.S. at 477 (citations omitted).

A few years later, this Court faced an issue very similar to the one in the present case: In *Rowan Cos. v. United States*, 452 U.S. 247 (1981), the issue was whether the value of meals and lodging provided to employees on offshore oil rigs was excludible from "wages" for purposes of the Federal Insurance Contribution Act, 26 U.S.C. §3101 *et seq.*, and the Federal Unemployment Tax Act, 26 U.S.C. §3301 *et seq.* Interpretive regulations promulgated under the general authority of 26 U.S.C. §7805(a) purported to provide the answer. After noting that the *National Muffler* factors relating to reasonableness would apply to these regulations, the Court indicated that higher deference would be due to them if there were within these statutory provisions a specific grant of authority for issuing regulations defining "wages".

> Congress itself defined the word at issue – "wages" -- and the Commissioner interpreted Congress' definition only under his general authority to "prescribe all needful rules." 26 U.S.C. §7805(a). Because we therefore can measure the Commissioner's interpretation against a specific provision in the Code, we owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory

> provision. . . . Where the Commissioner acts under specific authority, our primary inquiry is whether the interpretation or method is within the delegation of authority.

Rowan Cos., 452 U.S. at 253 (citations omitted). *Accord United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982) (less deference owed to interpretive regulations promulgated under 26 U.S.C. §7805(a)).

Then, in 1984, came the watershed case of *Chevron*. *Chevron* did not involve an interpretive tax regulation, but rather a regulation issued by the Environmental Protection Agency. There the Court stated:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-843 (references omitted). Significantly, the Court in *Chevron* drew a sharp distinction between regulations promulgated pursuant to specific delegations of regulatory authority and other regulations, holding that where Congress has made "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," the regulations promulgated thereunder are to be upheld "unless they are arbitrary, capricious, or manifestly contrary to the statute," whereas if "the legislative delegation to an agency on a particular question is implicit rather than explicit," the question becomes whether the regulation sets forth a "reasonable interpretation" of the statute. *Id.* at 843-844.

In 2001, the Court further elucidated the *Chevron* standard in *United States v. Mead Corp.*, 533 U.S. 218 (2001). In *Mead*, the issue was the validity of a customs ruling that had not been subjected to public notice and comment before issuance. The Court held that the customs ruling letter was not subject to *Chevron* deference, stating:

> We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in

> adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent. The Customs ruling at issue here fails to qualify, although the possibility that it deserves some deference under *Skidmore [v. Swift* & *Co.*, 323 U.S. 134 (1944)] leads us to vacate and remand.

Id. at 226-227. By way of further explanation, the Court stated:

> This Court in *Chevron* recognized that Congress not only engages in express delegation of specific interpretive authority, but that "[s]ometimes the legislative delegation to an agency on a particular question is implicit." Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's *generally conferred authority* and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its *generally conferred authority* to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise,

> but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is *reasonable*.

Id. at 229 (emphasis added and citations omitted).[3]

This Court has had several occasions after deciding *Chevron* and *Mead* to apply these principles to interpretive tax regulations promulgated pursuant to the general authority under 26 U.S.C. §7805(a). Significantly, in each such case, the Court has made it clear that the standard of reasonableness under *National Muffler*, rather than the higher standard of deference under *Chevron*, is applicable to interpretive tax regulations (such as the regulation at issue in this case) -- in most cases not even mentioning *Chevron* in this context. For example, in each of *Cottage Savings Association v. Commissioner*, 499 U.S. 554 (1991), *United States v.*

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[3] One commentator has observed of this last passage that it confirms that

> what the Court referred to as *Chevron* deference actually consists of two different levels of deference -- an arbitrary-and-capricious standard for regulations promulgated pursuant to "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," and a permissible-construction standard for regulations promulgated pursuant to an "implicit" delegation of "generally conferred authority" . . . .

Berg, *op. cit.*, at 497.

Cleveland Indians Baseball Co., 532 U.S. 200 (2001), and *Boeing Co. v. United States*, 537 U.S. 437 (2003), the Court assessed the validity of an interpretive tax regulation by applying the *National Muffler* standard, without so much as mentioning *Chevron*. *See also Atlantic Mutual Insurance Co. v. Commissioner*, 523 U.S. 382 (1998) (citing *Chevron* only for the longstanding proposition that courts and agencies must give effect to the unambiguously expressed intent of Congress); *Commissioner v. Estate of Hubert*, 520 U.S. 93, 127 (1997) (Scalia, J., dissenting) (discussing judicial deference to interpretive tax regulations by reference to *National Muffler*, without mentioning *Chevron*); *United States v. Boyle*, 469 U.S. 241 (1985) (mentioning *Chevron* in a tax case not involving the validity of a regulation).

From this clear line of authority, it is widely acknowledged that *Chevron* deference is due from the courts to "legislative" regulations promulgated under specific regulatory authority granted by Congress to the Treasury Department in a provision of the Internal Revenue Code other than 26 U.S.C. §7805(a). *See* ABA Task Force, 57 *Tax Lawyer* at 737-738 ("Federal courts should give *Chevron* deference to regulations promulgated by the IRS, with . . . legislative tax regulations receiving controlling deference under *Chevron* so long as they are not arbitrary, capricious, or manifestly contrary to the statute . . . ."); *see also* Berg, *op. cit.*, at 525-527. As noted below, however, the lower courts have not uniformly applied this Court's clear guidance that the reasonableness standard under *National Muffler* (rather than the higher level of deference under *Chevron*) is to be applied to interpretive tax

regulations promulgated under the general authority of 26 U.S.C. §7805(a).

The final important opinion of this Court in this regard is *National Cable & Telecomms. Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005). In *National Cable*, the issue was the validity of a ruling by the Federal Communications Commission. Several years before the ruling, in a suit by AT&T Corp. against the City of Portland, Oregon, the Ninth Circuit had held that broadband cable modem service is a "telecommunication service" within the meaning of the Communications Act of 1934, as amended. *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). At the time of the Ninth Circuit's holding, the FCC had declined, both in its regulatory capacity and as *amicus curiae*, to address the issue before the Ninth Circuit. *Id.*, at 876. Thereafter, the FCC decided to hold hearings on the issue. After receiving some 250 comments and meeting with a variety of industry representatives, consumer advocates, and state and local government officials, in 2002, the FCC issued a declaratory ruling along with a notice of proposed rulemaking. In the ruling, the FCC concluded that "cable modem service, as it is currently offered, is properly classified as an interstate information service, not as a cable service, and that there is no separate offering of telecommunications service. "*In re High-Speed Access*, 17 F.C.C. Rcd. 4798, 4802 (2002)." Since this ruling was in conflict with the prior holding of the Ninth Circuit, the parties brought the issue back to the Ninth Circuit. The Ninth Circuit, relying largely on *stare decisis*, followed its prior holding. *Brand X*

Internet Services v. FCC, 345 F.3d 1120 (9th Cir. 2003).

This Court reviewed the Ninth Circuit and reversed. In pertinent part, this Court stated:

> The Court of Appeals declined to apply *Chevron* because it thought the Commission's interpretation of the Communications Act foreclosed by the conflicting construction of the Act it had adopted in *Portland*. See 345 F.3d, at 1127-1132. It based that holding on the assumption that *Portland*'s construction overrode the Commission's, regardless of whether *Portland* had held the statute to be unambiguous. 345 F.3d, at 1131. That reasoning was incorrect.
>
> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. This principle follows from *Chevron* itself. *Chevron* established a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley, supra*, at 740-741. Yet allowing a judicial precedent to foreclose an

agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps. See 467 U.S., at 843-844, and n. 11. The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.

A contrary rule would produce anomalous results. It would mean that whether an agency's interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue: If the court's construction came first, its construction would prevail, whereas if the agency's came first, the agency's construction would command *Chevron* deference. Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur. The Court of Appeals' rule, moreover, would "lead to the ossification of large portions of our statutory law," *Mead*, 553 U.S., at 247 (Scalia, J., dissenting), by precluding agencies from revising unwise judicial constructions of

> ambiguous statutes. Neither *Chevron* nor the doctrine of *stare decisis* requires these haphazard results.

National Cable, 545 U.S. at 982-983.

II. WHAT THE LOWER COURTS HAVE SAID ON THE ISSUE OF DEFERENCE TO INTERPRETIVE TAX REGULATIONS

Notwithstanding this Court's clear guidance regarding the distinction between regulations promulgated pursuant to a specific grant by Congress of regulatory authority and regulations promulgated pursuant to a general grant of authority such as 26 U.S.C. §7805(a), the lower courts have come to a variety of conclusions regarding whether *National Muffler*, *Chevron*, or both apply in reviewing interpretive tax regulations.

In *Central Pa. Savings Assn. & Subs. v. Commissioner*, 104 T.C. 384 (1995), the Tax Court stated: "[W]e are inclined to the view that the impact of the traditional, i.e., *National Muffler* standard, has not been changed by *Chevron*, but has merely been restated in a practical two-part test with possibly subtle distinctions as to the role of legislative history and the degree of deference to be accorded to a regulation." *Id.* at 392.

The Tax Court has reiterated this position in numerous cases, including *Swallows Holding, Ltd. v. Commissioner*, 126 T.C. 96 (2006). There, the Tax Court faced the question of the validity of an

interpretive tax regulation that disallowed all deductions to a foreign corporation that had not filed its return within 18 months after its original due date. In *Swallows Holding*, the Tax Court stated: "[W]e conclude likewise that we need not parse the semantics of the two tests to discern any substantive difference between them. While we apply a *Natl. Muffler* analysis, our result under a *Chevron* analysis would be the same." *Id.* at 131. *Swallows Holding* represented a bold attempt by the Treasury Department to overrule judicial precedents issued by the predecessor of the Tax Court and the Court of Appeals for the Fourth Circuit interpreting a provision of the Internal Revenue Code that went back over 50 years. In applying the *National Muffler* factors, the Tax Court found the regulation invalid because it, among other things, was not issued contemporaneously with the statutory provision, was inconsistent with the law as interpreted previously by courts and longstanding regulations, and effected a change in interpretation in the face of multiple Congressional reenactments.

With regard to the Treasury Department's argument that it was entitled to overrule judicial precedent under the principles of *National Cable*, the Tax Court stated as follows:

> Given that the Supreme Court has historically reviewed Federal tax regulations primarily under the reasonableness test of *Natl. Muffler Dealers Association v. United States*, 440 U.S. 472 (1979), the question arises whether *Natl. Cable & Telecomm. Association v. Brand X Internet Servs.*, *supra*,

which neither cited *Natl. Muffler* nor involved a Federal tax regulation, applies to Federal tax regulations. We do not decide that question because we conclude that *Nat'l Cable* is distinguishable from this case and, thus, its holding is not controlling here. While we take seriously the Supreme Court's holding in *Natl. Cable*, we likewise take seriously that Court's discussion of its rationale for, and the context of, that holding. After considering that discussion, and the significant contrasts between that case and the case before us, we are persuaded for numerous reasons that the holding of *Natl. Cable* does not govern here.

First, the issue in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, *supra*, was whether broadband was subject to regulation as a telecommunications service. Before ruling, the Federal Communications Commission (FCC) had carefully considered technological developments and its own related interpretations. The Supreme Court's extensive discussion of the FCC's work on its ruling suggests that it was exactly the kind of agency decision that is most entitled to deference. Here, we find no corresponding record of the Secretary's consideration of whether the relevant text in 1990 included a timely filing requirement; the Secretary's rationale for adopting the disputed regulations is at best perfunctory.

Second, the Supreme Court in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet*

Servs., *supra*, noted that the FCC had not previously ruled on the question at hand, but that its ruling regarding broadband was consistent with prior FCC rulings. Here, the Secretary in 1990 directly altered regulations adopted in (and unchanged since) 1957. Thus, unlike *Natl. Cable*, the instant case raises questions as to the reasonableness and how much deference applies when the Secretary issues an interpretative regulation that reverses long-settled law.

Third, in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, *supra*, the FCC was not a party to *AT&T Corp. v. Portland*, 216 F.3d 871 (9th Cir. 2000), the prior case that the Court of Appeals for the Ninth Circuit had treated as controlling. Here, the Commissioner was the unsuccessful party in all of the cases holding that timely filing is not required for a foreign corporation to claim its deductions and credits. In addition, unlike the FCC, the Secretary through the disputed regulations is attempting to overturn the outcome of those cases through his general regulatory authority.

Fourth, *AT&T Corp. v. Portland*, *supra*, which the Supreme Court declined to permit to "trump" the FCC ruling, had been decided only approximately 5 years before *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, *supra*. Here, *Anglo-Am. Direct Tea Trading Co. v. Commissioner*, 38 B.T.A. 711

(1938), and its progeny were decided approximately 50 years before the disputed regulations were issued. Thus, in *Natl. Cable* the Supreme Court was not faced with the question of whether a longstanding judicial interpretation is entitled to more deference than a recent judicial interpretation. Nor was that Court faced with the question of the effect of the reenactment of the underlying statute on a prior judicial interpretation. The case of *Natl. Cable* also did not involve an agency that was seeking to reverse course from a preexisting, decades old regulatory position that was consistent with judicial precedents of even greater antiquity.

Moreover, apart from the previously mentioned differences, the Court in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, *supra*, stated that regulatory interpretations do not prevail over a contrary previous judicial interpretation when the judicial tribunal referred to the interpreted statute as unambiguous. Although the judicial tribunals in *Ardbern Co. v. Commissioner*, 120 F.2d 424 (4th Cir. 1941), *Blenheim Co. v. Commissioner*, 125 F.2d 906 (4th Cir. 1942), and *Anglo-Am. Direct Tea Trading Co. v. Commissioner*, *supra*, did not state explicitly that they were applying the unambiguous meaning of the word "manner", we believe that they did so, given their analysis and the fact that their interpretation of that word was purely one of statutory construction that resulted from the

> employment of traditional tools of statutory construction. "It is emphatically, the province and duty of the judicial department to say what the law is", *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Swallows Holding, 126 T.C., at 143-145.

In his dissent in *Swallows Holding*, Tax Court Judge Holmes noted the various positions of the different Courts of Appeals as to whether *National Muffler* or *Chevron* applied to interpretive tax regulations. He also argued that there were important distinctions between the two opinions, which the majority had not acknowledged. *Swallows Holding*, 126 T.C. at 181-182 (Holmes, J., dissenting).

The Third Circuit, in reversing the Tax Court, agreed with Judge Holmes. The Third Circuit stated:

> This case, grounded in the principles of administrative law, requires that we review the validity of an Internal Revenue Service (IRS) regulation. The Tax Court, in considering this regulation, analyzed it under the factors provided in *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979), and concluded that the regulation was invalid. In coming to this conclusion, the Tax Court explained that the standard established in *National Muffler* had not been replaced by *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), and that the result under either standard would be the same. We do not

> agree with the outcome reached by the Tax Court. We have determined that the result would not be the same under *Chevron* analysis as it would be under *National Muffler* and that the regulation here should be given *Chevron* deference.

Swallows Holding, Ltd. v. Commissioner, 515 F.3d 162, 164 (3d Cir. 2008). The Third Circuit went on to state:

> The Tax Court relied heavily on factors that, although relevant to the *National Muffler* standard, are not mandatory or dispositive inquiries under *Chevron*. As we set out above, the Tax Court reasoned that the challenged regulation was not a contemporaneous construction of the statute; the Tax Court found that the Fourth Circuit Court of Appeals and the Board of Tax Appeals had interpreted the statute as not including a timing element, and the Tax Court relied on the existence of several re-enactments of the statute without any change to the governing statutory language.

Swallows Holding, Ltd. v. Commissioner, 515 F.3d, at 167-168 (footnote omitted).

In effect, the Third Circuit, in a case involving an interpretive tax regulation, determined that this Court in *Chevron* repudiated the *National Muffler* standard, notwithstanding this Court's clear guidance, described above, that the *National Muffler* standard continues to be applicable to interpretive

tax regulations. Most remarkably, the Third Circuit cited for this proposition this Court's decision in *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001), which, as noted above, is one of the post-*Chevron* cases, contemporaneous with *Mead*, in which this Court applied the reasonableness test under *National Muffler* to an interpretive tax regulation without so much as mentioning *Chevron*.

Regarding *National Cable*, the Third Circuit found that the many prior judicial decisions interpreting the provision in issue were not "unambiguous" interpretations, and therefore did not foreclose the Treasury Department's interpretation.

Fresh off its 2008 victory in *Swallows Holding*, the Treasury last year tried another, even bolder, contortion of this Court's opinions in *National Cable* and *Chevron* to overrule judicial interpretations of the statute by issuing interpretive tax regulations.

26 U.S.C. §6501(a) provides an ordinary statute of limitations for assessing tax deficiencies of three years from the filing of a tax return. An exception to this 3-year rule is a 6-year statute of limitations in the case of omissions of gross income exceeding 25% of the gross income stated in the return. 26 U.S.C. §6501(e)(1)(A). Similar 3-year and 6-year rules apply to the time to issue a notice of final partnership administrative adjustment (hereinafter, an "FPAA"). *See* 26 U.S.C. §§6229(a) and (c)(2). The Internal Revenue Service is currently litigating cases against certain

partnerships that, it claims, overstated the tax basis in their assets, arguing that such an overstatement of basis can give rise to an understatement of gross income for purposes of the 6-year statutes of limitations – giving the Service up to six years to issue the FPAAs. In several cases over the past few years, the IRS has lost this argument in the Tax Court and two Courts of Appeals. Rather than seek review of these courts' holdings in this Court or seek a legislative amendment, the IRS has simply adopted a Temporary regulation under 26 U.S.C. §7805(a) interpreting the statute contrary to the courts' holdings. It has then gone back to the courts asking them to reconsider their rulings on the basis of these newly-issued temporary regulations. This was the procedural posture in *Intermountain Ins. Services of Vail, LLC v. Commissioner*, 134 T.C. No. 11 (May 6, 2010). The Tax Court there put the matter as follows:

> This was not an issue of first impression. In *Bakersfield Energy Partners, LP v. Commissioner*, *supra*, [128 T.C. 207 (2007), aff'd 568 F.3d 767 (9th Cir. 2009),] we held that a basis overstatement was not an omission from gross income for purposes of sections 6229(c)(2) and 6501(e)(1)(A). In reaching our conclusion, we applied the holding of *Colony, Inc. v. Commissioner*, 357 U.S. 28, 33, 1958-2 C.B. 1005 (1958), in which the Supreme Court was faced with identical language in section 6501(e)(1)(A)'s predecessor – section 275(c) of the Internal Revenue Code of 1939. See *Bakersfield Energy Partners, LP v. Commissioner*, *supra* at 215 ("We are

unpersuaded by respondent's attempt to distinguish and diminish the Supreme Court's holding in *Colony, Inc. v. Commissioner*".). The Supreme Court's holding, as we described it, was "that the extended period of limitations applies to situations where specific income receipts have been 'left out' in the computation of gross income and not when an understatement of gross income resulted from an overstatement of basis." *Id.* at 213. The Supreme Court had reviewed the statute's legislative history and determined that Congress had not intended a basis overstatement to be an omission from gross income. *See Colony, Inc. v. Commissioner*, *supra* at 33, 36.

We adhered to our precedent in *Bakersfield Energy Partners, LP v. Commissioner*, *supra*, when we issued our September 1, 2009, opinion in this case. See *Intermountain Ins. Services of Vail, LLC v. Commissioner*, T.C. Memo. 2009-195. Accordingly, in our September 1, 2009, order and decision, we granted petitioner's motion for summary judgment and decided that the adjustments in respondent's FPAA were barred by the general 3-year limitations period. That was not the end of the matter, however.

On September 24, 2009, less than a month after our order and decision in this case, respondent and the Treasury Department issued temporary regulations

under sections 6229(c)(2) and 6501(e)(1)(A). See secs. 301.6229(c)(2)-1T and 301.6501(e)-1T, Temporary Proced. & Admin. Regs., *supra*. These temporary regulations were simultaneously issued as proposed regulations. See sec. 7805(e). On September 28, 2009, notice was published and comments were sought for sections 301.6229(c)(2)-1T and 301.6501(e)-1T, Proposed Proced. & Admin. Regs., see Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations, 74 Fed. Reg. 49354 (Sept. 28, 2009), and the temporary regulations were published in the Federal Register, see secs. 301.6229(c)(2)-1T and 301.6501(e)-1T, Temporary Proced. & Admin. Regs., *supra*.

The temporary regulations provide, in pertinent part, that "an understated amount of gross income resulting from an overstatement of unrecovered cost or other basis constitutes an omission from gross income for purposes of * * * [sections 6229(c)(2) and 65011(e)(1)(A)]." See secs. 301.6229(c)(2)-1T and 301.6501(e)-1T, Temporary Proced & Admin. Regs., *supra*. The interpretation espoused by the temporary regulations runs contrary to the interpretation adopted by this Court in *Bakersfield Energy Partners, LP v. Commissioner*, 128 T.C. 207 (2007), and by the Courts of Appeals for the Ninth and Federal Circuits in *Bakersfield Energy Partners, LP v. Commissioner*, 568 F.3d 767 (9th Cir. 2009), and *Salman Ranch Ltd. v. United States*, 573

> F.3d 1362 (Fed. Cir. 2009), respectively. See T.D. 9466, 2009-43 I.R.B. 551, 552 ("The Treasury Department and the Internal Revenue Service disagree with these courts that the Supreme Court's reading of the predecessor to section 6501(e) in *Colony* applies to sections 6501(e)(1)(A) and 6229(c)(2).").
>
> Bolstered by the temporary regulations, respondent, on October 16, 2009, lodged -- and on November 25, 2009, was permitted to file -- an otherwise late motion to vacate our September 1, 2009, decision and a motion to reconsider our September 1, 2009, opinion.

Intermountain Ins. Services of Vail, LLC, *supra*, 134 T.C. No. 11 (slip op. at 6-10) (footnote omitted).

In *Intermountain*, the Tax Court rejected the IRS' attempt to overrule it (and this Court) by regulation. First, the Tax Court found that the effective date of the Temporary regulations was such that it did not govern the *Intermountain* case. Second, the Tax Court said it need not decide whether *Chevron* or *National Muffler* deference applied because "even if the temporary regulations are entitled to review under *Chevron*, they face a formidable obstacle to deference -- *Colony, Inc. v. Commissioner*, 357 U.S. 28, 33, 1958-2 C.B. 1005 (1958)." *Id.*, slip op. at 22. Third, applying *National Cable*, the Tax Court found that this Court in *Colony, Inc.* held that the statute unambiguously provided that an overstatement of tax basis is not an omission of gross income, such that, even under

Chevron, there was no room for the Treasury to fill in any gap. *Id.*, slip op. at 22-32.

Faced with the Treasury Department's increasingly aggressive assertions of regulatory authority, often citing this Court's opinions in *Chevron* and *National Cable*, the lower courts have taken widely disparate views regarding the level of deference to be applied to interpretive tax regulations promulgated under the authority of 26 U.S.C. §7805(a), with some courts applying the reasonableness test under *National Muffler*, others applying full arbitrary-and-capricious deference under *Chevron*, and still others falling somewhere in between. For surveys of the positions taken by the various Courts of Appeals, see *Swallows Holding*, 126 T.C. at 180-181 (Holmes, J., dissenting); Berg, *op. cit.*, at 502-523. Without guidance from this Court in this case, one can only expect increasingly aggressive issuances of interpretive tax regulations to overrule judicial precedent and more confusion in this area.

III. WHAT THE EIGHTH CIRCUIT DID AND SHOULD HAVE DONE IN THIS CASE

In the instant case, just as in *Swallows Holding* and *Intermountain*, the IRS could not win in court, so it decided to go back to court after having first amended an interpretive tax regulation to buttress its position. In December 2004, the amended Treasury regulation adopted a definition of "student" that excluded certain students because of their long hours. Thereafter, the IRS eventually got

before the Eighth Circuit, citing *Chevron* and *National Cable* as requiring that court to defer to the amended Treasury regulation's interpretation.

The Eight Circuit began its analysis of the amended regulation's validity by applying *Chevron* step one – determining whether the statute was unambiguous. Finding that the statute was ambiguous, the court then, with a "see generally" cite to *National Cable*, effectively held that the regulation could trump judicial rulings by four prior circuits that previously had held that "students" could not be limited by the number of hours worked. *Mayo Foundation v. United States*, 568 F.3d 675, 679-680 (8th Cir. 2009).

However, before holding the regulation valid, the Eighth Circuit – without acknowledging the confusion in the lower courts regarding how to review interpretive tax regulations – wrote: "Having concluded that the statute is silent or ambiguous on this question, we turn to the second part of the *Chevron* analysis, determining whether the Commissioner's amended regulation is a permissible interpretation of the statute. For this inquiry, the Supreme Court's opinion in *National Muffler* is instructive." *Id.*, at 680. At this point, the Eighth Circuit quoted the above-quoted passage from *National Muffler* setting forth the various factors for determining "reasonableness" – the very factors that the Third Circuit a year earlier had held were irrelevant in *Swallows Holding*. While acknowledging "that the full-time employee provision is of recent vintage"; *Id.*, at 682; the Eighth Circuit held that the IRS had not changed its

position: "[T]he historical record reflects a consistent substantive policy applying the generally worded 'incident to' regulation as not including full-time student employees." *Id.*, at 683. The Eighth Circuit concluded: "We conclude that this interpretation of the student exception, while not the only permissible interpretation, does not conflict with the plain language of the statute, and is consistent with the origin and purpose of the student exception as initially enacted and with Congress's frequent expansion of Social Security coverage in the last fifty years." *Id.* This conclusory language seems to ignore most of the *National Muffler* factors just cited and, essentially, to apply *Chevron* step two.

Amicus believes that while the Eighth Circuit garbled both the *Chevron* and *National Muffler* tests, its instincts were in the right place. *Amicus* agrees with those commentators who argue that, when it comes to interpretive tax regulations adopted under the general authority of 26 U.S.C. §7805(a), the courts should look to a regulation's reasonableness under the *National Muffler* standard. As noted, this Court in *Chevron* and *Mead* explicitly recognized a distinction in deference based on whether a regulation was promulgated under an explicit delegation to fill in a gap or only "generally conferred authority". *Chevron*, *supra*, 467 U.S., at 842-846; *Mead*, *supra*, 533 U.S. at 229. And indeed, this Court's opinions issued since *Chevron* apply the *National Muffler* "reasonableness" factors to the evaluation of interpretive tax regulations. The ABA Task Force stated:

> This Report reviews post-*Chevron* tax cases through the end of 2003, and concludes that although *Chevron*'s two-step process has been affirmed for tax cases, the Supreme Court nonetheless has consistently applied the *National Muffler* test to determine if a general authority regulation is reasonable. The distinction is also appropriate since *Chevron* offers no apparent guidance for applying the reasonableness test, while *National Muffler* provides considerable guidance.

ABA Task Force, 57 *Tax Lawyer* at 740 (footnotes omitted). The ABA Task Force explicitly endorses this practice, recommending:

> Federal courts should give *Chevron* deference to regulations promulgated by the Treasury and the IRS, with (i) legislative tax regulations receiving controlling deference under *Chevron* so long as they are not arbitrary, capricious, or manifestly contrary to the statute, and (ii) interpretive tax regulations receiving the same controlling deference if they are reasonable under the test of *National Muffler*, which examines such factors as the extent to which the regulation harmonizes with the plain language, origin, and purpose of the statute; the manner in which the regulation evolved; the length of time the regulation has been in effect; the reliance placed on it; the consistency of interpretation; and the

> degree of scrutiny Congress has devoted to the regulation . . . .

Id., at 737-738. In accord is Berg, *op. cit.*, at 528 ("[W]hen Congress chooses not to enact a specific delegation in a particular case and leaves it to section 7805(a) to authorize the necessary regulations, it would appear that Congress is signaling that it intends and expects that section 7805(a) regulations will not be accorded the highest, arbitrary-and-capricious level of deference." (footnote omitted)). Berg goes on to note, *id.*:

> *National Cable*, a non-tax case in which the Court applied a permissible-construction or reasonableness standard to a regulation promulgated pursuant to a delegation quite similar to section 7805(a), further supports this position. Indeed, it could well be in recognition of this distinction Congress draws between specific delegations and the general delegation under section 7805(a) that the Supreme Court has continued after *Chevron* and *Mead* to apply the *National Muffler* standard, rather than arbitrary-and-capricious deference, to section 7805(a) regulations.

Amicus takes issue with the Eighth Circuit only as to its incomplete application of the *National Muffler* "reasonableness" factors to the regulation at issue defining "student".

The other problem that *amicus* sees in the Eight Circuit's approach is that it applies the

National Cable opinion uncritically in the tax area. As the Tax Court and commentators have noted, tax regulations differ from the FCC regulations that were at issue in *National Cable*. The IRS is the tax collector. It is hardly a neutral arbiter of the Internal Revenue Code in the same way that other government agencies, such as the FCC, would be an arbiter between competing groups of the public. As Berg puts it, *id.*, at 530:

> When, for example, the FCC issues a proposed rule for public comment, the rule would presumably affect different segments of the telecommunications and information industries in different ways, to the benefit of some competitors and the detriment of others. As a result, one would expect a spirited exchange of views by those commenting on the proposed rule, with those companies and industries whose "ox is gored" expressing heated opposition and those whose financial prospects would be enhanced singing the praises of the rule. While something similar can occur with tax regulations, by and large proposed tax regulations do not pit the fortunes of one company or industry against another's, but rather place taxpayers as a group on one side of the comment process and the Treasury Department on the other, with the commenting parties all expressing either outrage or satisfaction with the proposed regulations. To be sure, bar associations and other professional societies such as the AICPA often weigh in with more general policy comments, many of which commendably

> address tax policy issues in a neutral matter rather than taking solely pro-tax-payer positions. Nonetheless, the fundamental difference between the nature of the public comment process regarding tax and other regulations remains.

The ABA Task Force said it this way:

> [T]he primary purpose of the IRS is to raise money for the government. "The major responsibility of the Internal Revenue Service is to protect the public fisc." *United States v. Hughes Properties, Inc.*, 476 U.S. 593, 603 (1986). This unique purpose, in litigation outside the Tax Court, gives rise to unique laws as to administrative procedure. The Supreme Court in *Bull v. United States*, 295 U.S. 247, 259-60 (1935), recognized the unique nature of our tax assessment and collection system:
>
> > Taxes are the life-blood of government, and their prompt and certain availability an imperious need. . . . Thus the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense. . . . The assessment supersedes the pleading, proof and judgment necessary in an action at law, and has the force of such a judgment. . . . The taxpayer often is afforded his hearing after judgment and

> after payment, and his only redress for unjust administrative action is the right to claim restitution.

> This function of the IRS may encourage the agency to issue rulings or to promulgate regulations that test the outer limits of reasonableness. Courts have scolded the IRS for twisting laws to further revenue collections rather than Congressional purpose.

ABA Task Force, 57 *Tax Lawyer* at 724-725.

The ABA Task Force also noted the inherent advantages of the IRS in tax controversies: In judicial proceedings, the assessment or determination of the IRS is presumed to be correct. See *Welch v. Helvering*, 290 U.S. 111, 115 (1933). And,

> a general policy of broad deference seems unjustified in view of the very large, almost punitive, amounts of penalties, as well as interest charges that go well beyond time value of money considerations, that often accumulate in large tax cases and which can far exceed the original deficiency. The IRS's ability to impose confiscatory penalties and rates of interest not consistent with time value concepts warrants caution in applying deference to agency pronouncements.

ABA Task Force, 57 *Tax Lawyer* at 724.

Then, there is the matter of *National Cable*'s allowing an agency to correct its prior errors by overruling judicial opinions. As the Tax Court noted in *Swallows Holding*,

> [I]n *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, *supra*, the FCC was not a party to *AT&T Corp. v. Portland*, 216 F.3d 871 (9th Cir. 2000), the prior case that the Court of Appeals for the Ninth Circuit had treated as controlling. Here, the Commissioner was the unsuccessful party in all of the cases holding that timely filing is not required for a foreign corporation to claim its deductions and credits.

Swallows Holding, *supra*, 126 T.C., at 144-145. Thus, *National Cable* is distinguishable.

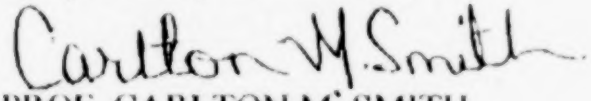
For all of these reasons, the courts should not allow the Treasury Department, merely by the issuance of an interpretive tax regulation under the general authority of 26 U.S.C. §7805(a), to overrule consistent taxpayer-favorable judicial interpretations of provisions of the Internal Revenue Code. In circumstances, such as this one, where the Treasury Department has consistently lost the issue in the courts, unlike the case with other agencies, the Treasury Department should be required to seek reversal in Congress. *Amicus* is not a big fan of "tax exceptionalism", but to apply *National Cable*'s holding in the tax area uncritically is to give more power to an agency that is, at least in this respect, already "exceptional". A less stringent application of *National Cable* in the tax context thus becomes a

way of leveling the playing field somewhat in the context of interpreting the Internal Revenue Code.

CONCLUSION

In reversing the Eighth Circuit, this Court should (1) clarify that the *National Muffler* reasonableness test remains the standard by which interpretive tax regulations promulgated under the authority of 26 U.S.C. §7805(a) are to be evaluated, and (2) hold that no deference is to be given to interpretive tax regulations that are contrary to longstanding, consistent judicial interpretations favoring the taxpayer concerning the same statutory language.

Respectfully submitted,



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August 2010

AMICUS CURIAE BRIEF

No. 09-837

IN THE

Supreme Court of the United States

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH, ET AL.,
Petitioners,
v.
UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF UNIV. OF ALABAMA AT BIRMINGHAM, UNIV. OF ARKANSAS, BOSTON MED. CENTER, BRIGHAM AND WOMEN'S HOSP., UNIV. OF CHICAGO MED. CENTER, CHRISTIANA CARE HEALTH SERVICES, CLEVELAND CLINIC FOUNDATION, DARTMOUTH-HITCHCOCK MED. CENTER, EMORY UNIV., FRANKLIN SQUARE HOSP., GEORGE WASHINGTON UNIV., GEORGETOWN UNIV. HOSP., GOOD SAMARITAN HOSP., HARBOR HOSP., JOHNS HOPKINS UNIV., MCGAW MED. CENTER OF NORTHWESTERN UNIV., MAINE MED. CENTER, MASSACHUSETTS GENERAL HOSP., MICHIGAN STATE UNIV., MONTEFIORE MED. CENTER, MOUNT SINAI SCHOOL OF MED./MOUNT SINAI HOSP., NATIONAL REHABILITATION HOSP., NEW YORK MED. COLLEGE, NEW YORK UNIV. SCHOOL OF MEDICINE, UNIV. OF NORTH DAKOTA, UNIV. OF PITTSBURGH MED. CENTER, UNIV. OF ROCHESTER, SAINT LOUIS UNIV., UNIV. OF SOUTHERN CALIFORNIA, MED. UNIV. OF SOUTH CAROLINA, SPAULDING REHABILITATION HOSP., STANFORD UNIV., THOMAS JEFFERSON UNIV., UNION MEMORIAL HOSP., VANDERBILT UNIV., WASHINGTON HOSP. CENTER, AND YALE-NEW HAVEN HOSP. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Treasury Department may categorically exclude all medical residents and other fulltime employees from the definition of "student" in 26 U.S.C. § 3121(b)(10), which exempts from Social Security taxes "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university."

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United States v. Mayo Foundation for Medical Educational & Research, 282 F. Supp. 2d 997 (D. Minn. 2003) ..... passim

United States v. Memorial Sloan-Kettering Cancer Center, 563 F.3d 19 (2d Cir. 2009) 4

United States v. Mount Sinai Medical Center of Florida, Inc., No. 02-22715, 2008 WL 2940669 (S.D. Fla. May 28, 2008) 3, 14, 15, 18, 24, 25

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26 U.S.C. § 3121(b)(10) 2, 4, 6, 11, 13

26 C.F.R. § 31.3121(b)(10)-2(c) 4, 5

26 C.F.R. § 31.3121(b)(10)-2(d) 5, 6, 12

26 C.F.R. § 31.3121(b)(10)-2(e) 5, 23, 26, 27

69 Fed. Reg. 76,404 (Dec. 21, 2004) 4

OTHER AUTHORITIES

Accreditation Council for Graduate Medical Education, *2008-09 Annual Report*, http://www.acgme.org/acWebsite/annRep/an_2008-9AnnRep.pdf 20
Accreditation Council for Graduate Medical Education, "ACGME At A Glance," http://www.acgme.org/acWebsite/newsroom/ataglance.pdf 19, 20
Accreditation Council for Graduate Medical Education, *Common Program Requirements* (July 1, 2007), http://www.acgme.org/acWebsite/dutyhours/dh_dutyhourscommonpr07012007.pdf ..... passim
Accreditation Council for Graduate Medical Education, Program Requirements for Graduate Medical Education in Emergency Medicine, http://acgme.org/acWebsite/downloads/RRC_progReq/110emergencymed07012007.pdf. 21
Patrick C. Alguire, "A Review of Journal Clubs in Postgraduate Education," 13 J. of Gen. Internal Med. 347 (May 1998) 17
American Council on Education, "Working Their Way Through College" (May 2006) , http://www.nsea.info/docs/services/resources/ACEBrief.pdf. 10, 11
Michael Bliss, *William Osler: A Life In Medicine* (Oxford 1999) 3
"Educational Conferences," http://gme.dartmouth-hitchcock.org/im/educational_conferences.html 28

"Internal Medicine Residency,"
http://www.gwumc.edu/edu/medicine/residency/Administration/ ProgramDirector.htm 29
I.R.S. News Release IR-2010-25 (Mar. 2, 2010)..... 4
Susan R. Komives, Dudley B. Woodard, Jr., *Student Services: A Handbook for the Profession* (4th ed. 2003) 11
"Morbidity and Mortality Conference,"
http://www.gynob.emory.edu/education/Conferences/Morbidity and Mortality Conference.html..... 16, 17
"Mount Sinai School of Medicine,"
http://www.mssm.edu/departments-and-institutes/neurosurgery/programs-and-services/neurosurgeryresidency/conferences 17
Ninth New Collegiate Dictionary (1990) 10
Oxford Universal Dictionary (3d ed. 1955) 10
"Pathology Residency Programs,"
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Webster's New World Medical Dictionary (3d ed. 2008)..... 16
Yale University, *Graduate School of Arts and Sciences, Program and Policies 2010-2011*, http://www.yale.edu/printer/bulletin/htmlfiles/grad/graduate-school-of-arts-and-sciences-programs-and-policies-2010-2011.pdf.....11, 12, 27

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 37 of the nation's leading universities, teaching hospitals, and other institutions that sponsor residency programs: University of Alabama at Birmingham, University of Arkansas, Boston Medical Center, The Brigham and Women's Hospital, Inc., The University of Chicago Medical Center, Christiana Care Health Services, The Cleveland Clinic Foundation, Dartmouth-Hitchcock Medical Center, Emory University, Franklin Square Hospital, The George Washington University, Georgetown University Hospital, Good Samaritan Hospital, Harbor Hospital, Johns Hopkins University, McGaw Medical Center of Northwestern University, Maine Medical Center, The General Hospital Corporation d/b/a/ Massachusetts General Hospital, Michigan State University, Montefiore Medical Center, Mount Sinai School of Medicine/The Mount Sinai Hospital, National Rehabilitation Hospital, New York Medical College, New York University Medical School, University of North Dakota, University of Pittsburgh Medical Center, University of Rochester, Saint Louis University, University of Southern California, Medical University of South Carolina, The Spaulding

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* made a monetary contribution to its preparation or submission. The parties have consented in writing to the filing of this brief.

Rehabilitation Hospital Corporation, Stanford University, Thomas Jefferson University, Union Memorial Hospital, Vanderbilt University, Washington Hospital Center, and Yale-New Haven Hospital.

This case presents a question of great importance to *amici*: whether the Treasury Department has interpreted a provision of the Federal Insurance Contribution Act ("FICA") contrary to the statute's plain language. FICA generally imposes a tax on the wages paid to employees, but it provides an exemption for "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10). Under the Treasury Department's interpretation of this provision, medical residents are categorically excluded from this exemption if they are on duty more than 40 hours per week. Pet. App. 18a-19a.

Amici have a significant interest in the question presented because they sponsor medical residency programs. In total, *amici* sponsor more than 1,600 residency programs comprising more than 20,000 medical residents. Thus, the Court's resolution of the issue presented in this case will directly affect *amici* because it could determine whether they are required to pay FICA taxes for the residents enrolled in their programs. *Amici* believe that their participation in this case will benefit the Court by offering the perspective of a broad range of universities and teaching hospitals that are subject to the regulations at issue in this case.

STATEMENT

Sir William Osler, one of the most respected physicians at the turn of the twentieth century, revolutionized medical education by emphasizing the importance of treating patients as part of the learning process. As Osler famously said: "To study the phenomenon of disease without books is to sail an uncharted sea, while to study books without patients is not to go to sea at all." Michael Bliss, *William Osler: A Life In Medicine* 293-94 (Oxford 1999).

Osler's approach to medical education forms the foundation of today's medical residency programs. Residency programs provide education and training in various medical specialties (for example, internal medicine) or subspecialties (for example, cardiology) for recent medical school graduates. Although medical school graduates have already earned a Doctor of Medicine degree, "[i]t is generally accepted that physicians are not deemed fully trained to independently practice medicine in a specialty or subspecialty without completing a residency program." *United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, No. 02-22715, 2008 WL 2940669, at *3 (S.D. Fla. July 28, 2008).

Despite the essential role that residency programs play in educating physicians, the Treasury Department has issued regulations that interpret the term "student" in the Federal Insurance Contribution Act ("FICA") to exclude medical residents. FICA generally imposes a tax on wages paid to employees, but it contains numerous exemptions. As relevant here, FICA taxes are not

assessed for "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10) ("Student Exemption"). This statutory exemption has existed since 1939. Pet. App. 34a.

The Treasury Department first issued regulations interpreting the Student Exemption in 1940. *Id.* at 35a n.4. These regulations, which remained largely unchanged until 2004, provided that a person who performed services "as an incident to and for the purpose of pursuing a course of study" qualified for the Student Exemption. 26 C.F.R. § 31.3121(b)(10)-2(c) (2004). As the government now concedes, medical residents qualify for the Student Exemption under these regulations. *See* U.S. Brief In Opp. 14 n.2 (citing I.R.S. News Release IR-2010-25 (Mar. 2, 2010), http://www.irs.gov/pub/irs-tege/nr-2010_25.pdf.).[2]

In 2004, the Treasury Department amended its regulations interpreting the Student Exemption. 69 Fed. Reg. 76,404 (Dec. 21, 2004). The amended regulations continue to provide that "the employee's

[2] The government changed its position on this issue in March 2010, after federal courts repeatedly rejected its argument that medical residents did not qualify for the Student Exemption under the pre-2005 regulations. *See United States v. Mem'l Sloan Kettering Cancer Ctr.*, 563 F.3d 19 (2d Cir. 2009), *United States v. Detroit Med. Ctr.*, 557 F.3d 412 (6th Cir. 2009), *Univ. of Chicago Hosps. v. United States*, 545 F.3d 564 (7th Cir. 2008), *United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248 (11th Cir. 2007).

services must be incident to and for the purpose of pursuing a course of study" in order to qualify for the Student Exemption. 26 C.F.R. § 31.3121(b)(10)-2(c). Under the new regulations, however, whether an individual meets this requirement generally is determined by comparing the "educational aspect" of the employee's relationship with the employer with the "service aspect" of the relationship. *Id.* § 31.3121(b)(10)-2(d)(3)(i). The regulations require that the "educational aspect" predominate in order for the employee to be considered a student. *Id.*

Although "student" status generally is determined by comparing the educational and service aspects of an individual's relationship with the school, college, or university, the regulations state that this balancing approach does not apply for "full-time employees." *Id.* § 31.3121(b)(10)-2(d)(3)(iii). Instead, employees who typically work 40 hours or more per week are excluded from the Student Exemption regardless of whether the educational aspect of their relationship predominates over the service aspect. *Id.* The regulations expressly identify medical residents as persons who are categorically excluded from the Student Exemption for this reason. *Id.* § 31.3121(b)(10)-2(e), Ex. 4.

SUMMARY OF THE ARGUMENT

I. The Treasury Department's regulations are invalid because they define "student" in a way that is contrary to its ordinary meaning. The term "student" ordinarily means a person who attends a school for the purpose of obtaining an education. Students frequently are employed while they are

attending school, but the ordinary meaning of "student" does not depend in any way on the fact of employment. A person who must work to earn enough money to pay tuition is no less a "student" than one who receives a scholarship. Despite this ordinary meaning, the regulations define "student" by reference to the amount of time that the person devotes to employment. Because this approach is contrary to the plain language of the statute, it is invalid under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

II. The regulations are also invalid because they unreasonably exclude medical residents from the Student Exemption. The regulations interpret the Student Exemption to apply only if the services provided by the student are "incident to and for the purpose of pursuing a course of study." 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(i). The regulations further provide that whether this requirement is met is determined by comparing the educational and service aspects of the person's relationship with the school, college, or university. The Treasury Department has made a categorical determination that the services provided by medical residents are never "incident to and for the purpose of a course of study," even though there is no basis for the determination that the service aspect of a residency always predominates over the educational aspect.

A. Medical residents satisfy the statutory requirement that they must be "enrolled and regularly attending classes at a school, college, or university." 26 U.S.C. § 3121(b)(10).

The application and enrollment process for medical residencies is similar to the process for other higher education programs. Prospective residents submit applications, letters of recommendations, and transcripts. The applications are reviewed by faculty members, and the program director ultimately decides which applicants to admit. Residents view selecting a residency program as choosing where to enroll in school, not as picking a first job.

Medical residents also attend a significant number of classes. In addition to classes specific to the particular specialties, most residency programs include a range of other classes. Common classes include: (1) core curriculum conferences; (2) grand rounds; (3) morbidity and mortality conferences; and (4) journal clubs. These classes provide lectures, discussion seminars, and case studies that educate medical residents on core concepts in their specialty, interesting and unusual patient conditions and complications, and the most recent developments in the medical literature. Like other students, residents are evaluated on how well they perform in class.

B. The Treasury Department's regulations interpret the phrase "incident to and for the purpose of pursuing a course of education" to require that the educational aspect of the relationship between a student and his or her school must predominate over the service aspect of the relationship. This interpretation provides no justification for the categorical exclusion of medical residents from the Student Exemption because there is no basis for determining that the educational aspect of a medical

residency *never* predominates over the service aspect. *See Chevron*, 467 U.S. at 843-44.

The regulation's exclusion of medical residents is inconsistent with the accreditation standards for residency programs. The vast majority of residency programs sponsored by Petitioners and *amici* are accredited by the Accreditation Council for Graduate Medical Education ("ACGME"). ACGME sets minimum educational requirements that residency programs must meet in order to be accredited. The standards require that didactic and clinical education must be the primary focus of a resident's time and energy. To be accredited, a residency program must have a program director in charge of ensuring that the program focuses on education, and a faculty that devotes sufficient time to fulfill their supervisory and teaching responsibilities. An accredited program must also have a formal curriculum that sets forth the educational requirements for the program.

The regulations' refusal to consider the educational value of patient care is unreasonable. Medical residents spend a significant amount of time treating patients because it is essential to their education. The educational nature of residents' treatment of patients is confirmed by the fact that hospitals do not charge for services performed by residents. Residents treat patients only under the supervision of staff physicians. Because staff physicians must review and approve the resident's diagnoses and treatment decisions, a hospital operates less efficiently with residents than it would without them. Accordingly, for-profit hospitals generally choose not to offer residency programs.

The "full-time employee" rule is unreasonable because it excludes medical residents from the Student Exemption regardless of the educational content of their residency program, based solely on the fact that they are on duty for 40 or more hours per week. Other examples in the regulations illustrate that the relative significance of the "educational" and "service" aspects is not determined based solely on the number of hours spent on each activity. A Ph.D. student who works as a teaching assistant for 20 hours per week can qualify for the Student Exemption even if his or her course-load is less than 20 hours per week. In addition to the educational value of patient care, many residency programs require a significant amount of time (frequently 10-15 hours) to be spent each week on other educational activities. Moreover, residents are often required to spend significant amounts of time conducting research. Because residents spend a substantial amount of time on educational activities, there is no basis for categorically excluding them from the Student Exemption based solely on the fact that their typical schedule exceeds 40 hours per week.

ARGUMENT

I. The Treasury Department's Regulations Are Invalid Because They Are Contrary To The Plain Language Of The Statute.

Congress did not define "student" when it enacted the Student Exemption, and therefore the term must be given its "ordinary, contemporary, common meaning." *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (internal quotation marks omitted). The

Treasury Department's regulations, however, do not give "student" its ordinary meaning. Instead, they interpret the term by reference to the amount of time that a person devotes to his or her employment. Because the amount of time that a person devotes to employment does not determine whether he or she is a "student," the regulations are invalid. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (When "the intent of Congress is clear, that is the end of the matter.").

The ordinary meaning of the term "student" is an individual who attends a school for the purpose of acquiring knowledge. *See, e.g., Webster's New Int'l Dictionary* 2268 (3d ed. 1981) (defining "student" as "an individual who engages in 'study' and is 'enrolled in a class or course in a school, college, or university,'" and defining "study" as "the application of the mental faculties to the acquisition of knowledge"); *Ninth New Collegiate Dictionary* 1170 (1990) (defining "student" as "one who attends a school," and "one who studies"); *Oxford Universal Dictionary* 2049-50 (3d ed. 1955) (defining "student" as one who engages in "study" by applying the mind "to the acquisition of learning, whether by means of books, observation, or experiment"). None of these dictionaries defines "student" by reference to the person's employment or amount of time that the person spends working.

According to one recent study, "[w]orking students are ubiquitous in American higher education." American Council on Education, "Working Their Way Through College," at 2 (May 2006), http://www.nsea.info/docs/services/resources/ACEBrief.pdf. During the 2003-04 academic year,

between 70 and 80 percent of undergraduate students held jobs, and more than a third worked at least 35 hours per week. *Id.* at 7. Indeed, "it has become increasingly the norm that students are working while pursuing college study. Most students (both full-time and part-time) are working, and the trend is toward students working for a considerable number of hours each week." Susan R. Komives, Dudley B. Woodard, Jr., *Student Services: A Handbook for the Profession* 55 (4th ed. 2003). Students who work while attending a school, college, or university are no less "students" than their classmates who do not work.[3]

Many students work in order to pay for their education. For others, including the medical residents at issue in this case, employment is an integral part of their education. As discussed below, *see* Part II.B.2 *infra*, patient care is an essential part of a medical resident's education. Medical residents are not unique in this regard. For example, Ph.D. students are often required to work as teaching assistants as part of their formal curriculum. *See, e.g.*, Yale University, *Graduate School of Arts and Sciences, Program and Policies 2010-2011* 63 (July

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[3] Many working students are not eligible for the Student Exemption, but that is not because they are not "students." Rather, they are excluded from the Student Exemption because that exemption applies only to "service performed in the employ of a school, college, or university." 26 U.S.C. § 3121(b)(10). Thus, students who work at fast food restaurants do not qualify for the Student Exemption because they are not employed by a school, college or university, but they are still "students."

15, 2010), http://www.yale.edu/printer/bulletin/htmlfiles/grad/graduate-school-of-arts-and-sciences-programs-and-policies-2010-2011.pdf. As with medical residents, the Ph.D. candidate's "[t]eaching experience is regarded as an integral part of the graduate training program." *Id.*

In short, the ordinary meaning of a "student" is an individual who engages in study and is enrolled in a class or course in a school, college, or university. A student who works is nonetheless a "student" within the ordinary meaning of that term. Because the Treasury Department's regulations interpret the term "student" in a way that is contrary to its ordinary meaning, they are invalid. *See Chevron*, 467 U.S. at 842.

II. The Treasury Department's Regulations Are Invalid Because They Impermissibly Exclude Medical Residents From The Student Exemption.

The Treasury regulations are also invalid because they incorrectly state that services provided by medical residents "are not incident to and for the purpose of pursuing a course of study." 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii) & (e), Ex. 4. Under the regulations, this requirement is met if the "educational aspect" of an individual's relationship with the school predominates over the "service aspect" of the relationship. *Id.* § 31.3121(b)(10)-2(d)(3)(i). The Treasury Department had no basis for adopting a categorical determination that the educational aspect of a medical residency *never* predominates over the service aspect. Accordingly, the regulations are also invalid because they are

unreasonable. *See Chevron*, 467 U.S. at 843-45 (Even if the statutory language is ambiguous, agency's interpretation may not be arbitrary, capricious, or unreasonable).

A. Medical Residents Satisfy The Statutory Requirements For The Student Exemption.

According to the terms of the statute, the Student Exemption applies to "students" who are "enrolled and regularly attending classes at [a] school, college, or university." 26 U.S.C. § 3121(b)(10). This statutory requirement provides no justification for the regulations' categorical exclusion of medical residents because residents are enrolled and regularly attend classes at a school, college, or university.

1. Medical Residents Are Enrolled At A School Or University.

The district court determined that the residents at the Mayo Foundation for Medical Education and Research ("Mayo Foundation") and University of Minnesota were enrolled at their respective schools. Pet. App. 38a n.8, 60a-62a. The district court's summary of the application and enrollment process at the University of Minnesota demonstrates that the admissions process for residency programs is similar to the process for other higher education programs. The court noted that applicants are required to submit "residency applications, letters of recommendation, medical-student performance evaluations, transcripts, and other supporting credentials." *Id.* at 61a. The

residency program directors and faculty review the applications and interview applicants. *Id.* The Mayo Foundation gives its program director "the ultimate authority in determining which applicants it intends to admit and in what order of preference." *Id.*

Another district court recently reached the same conclusion after a trial. *See Mount Sinai*, 2008 WL 2940669, at *29. According to the court, "the application and admission process . . . closely resemble[s] that of a traditional school, college, or university." *Id.* "The medical student/aspiring resident looks at residency training as an element in his or her education in the same way high school students, when applying to college, judge whether a degree from college A or a degree from college B is going to help them more." *Id.* at *5 (internal quotations marks, citations, and brackets omitted). As a result, "[w]hen a resident is picking residency programs, he does not view the process to be one of picking his first 'job.'" *Id.* Instead, residents "think of residencies as education and not 'on-the-job training.'" *Id*; *see also* Pet. App. 38a n.8 ("The Government's characterization of a residency program as 'on-the-job' training misses the mark and ignores the fact that residents apply to and enroll in a residency program for an education purpose.").

Thus, both the residency program sponsors and the program applicants regard the acceptance of medical school graduates into a residency program as enrollment in an educational program as opposed to acceptance in a traditional employment setting.

2. Medical Residents Regularly Attend Classes.

Medical residents regularly attend classes. Although curricula vary according to the requirements of the medical specialty areas of the residency programs, most residency programs include certain basic types of classes. Common classes include: (1) core curriculum conferences; (2) grand rounds; (3) morbidity and mortality conferences; and (4) journal clubs. Petitioners' residency programs included all four types of classes. Pet. App. 41a n.10, 63a; *see also Mount Sinai*, 2008 WL 2940669, at *30 ("[R]esidents attended core curriculum conferences, grand rounds, lectures, morbidity and mortality conferences, and journal clubs."). Attendance for the courses is typically mandatory. *See, e.g., id.* at *30 ("Attendance at conferences and lectures was mandatory across all residency programs, and each program monitored attendance, typically through sign-in sheets.").

Core Curriculum Conferences

The core curriculum conferences typically comprise a lecture series covering the core concepts for the program's specialty. For example, the general surgery residency at *amicus* Stanford University includes a "Core Course" that is a weekly, 90-minute class. *See* "Stanford University School of Medicine," http://med.stanford.edu/gensurg/education/core.html. For each class, the residents are assigned required reading from the "Sabiston Textbook of Surgery" and optional reading from "Greenfield's Textbook of Surgery." *Id.* During the first 30 minutes of the lecture, a resident presents the key points of the

week's reading. *Id.* Each resident is assigned to make the presentation at a specific lecture and is expected to prepare slides for the presentation. *Id.* For the last 60 minutes of the class, a faculty member presents a case-based lecture on the topic. *Id.*

Grand Rounds

"Grand rounds" is typically a formal lecture series in which the lecturers "present clinical problems in medicine by focusing on current or interesting cases." *Webster's New World Medical Dictionary* (3d ed. 2008). For example, the surgical grand rounds at *amicus* Boston Medical Center "are held weekly for surgical faculty, residents, and medical students. A subject of surgical importance is presented and discussed in depth by experts in the field. Time is left after each presentation for questions." "Teaching Conferences & Rounds," http://www.bumc.bu.edu/generalsurgery/teaching-conferences-rounds/.

Morbidity and Mortality Conferences

Morbidity and Mortality Conferences are case studies involving patient complications and deaths. One of *amici*'s programs, the gynecology and obstetrics residency at Emory University, informs its residents that the purpose of these conferences "is to provide a safe venue for residents to identify areas of improvement, and promote professionalism, ethical integrity and transparency in assessing and improving patient care." "Morbidity and Mortality Conference," http://www.gynob.emory.edu/education/Conferences/Morbidity and Mortality Conference.html. For each conference, a resident is assigned

responsibility for selecting a patient for the case study and providing a 30-minute presentation. *Id.* For the remaining portion of the conference, a faculty member moderates a discussion of the case. *Id.* All residents are required to attend the conference; faculty members are invited and expected to attend. *Id.*

Journal Clubs

Journal clubs have been described as "an integral part of most training programs." Patrick C. Alguire, "A Review of Journal Clubs in Postgraduate Education," 13 J. of Gen. Internal Med. 347, 351 (May 1998). "Initially, journal clubs served to help practitioners stay abreast of scientific developments, but more recently they have been used as a vehicle to teach critical appraisal skills, research design, medical statistics, clinical decision theory, and clinical epidemiology." *Id.* at 347. Like many of *amici*'s programs, the journal club for the neurosurgery residency at Mount Sinai School of Medicine selects journal articles on a particular topic, and the articles are "presented by the residents with open discussion about the merits of that paper." "Mount Sinai School of Medicine," http://www.mssm.edu/departments-and-institutes/neurosurgery/programs-and-services/neurosurgery-residency/conferences. The discussion "is directed by an attending with a particular interest and expertise in the area under discussion." *Id.*

* * *

Like students in other higher education programs, residents are evaluated on how well they perform in these classes. At the University of

Minnesota, for example, residents take examinations and their "performance in each subject-matter rotation [is] evaluated, graded, and recorded on the resident's transcript." Pet. App. 63a-64a; *see also United States v. Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 1017 (D. Minn. 2003) ("*Mayo I*"); *see also Mount Sinai*, 2008 WL 2940669, at *30 ("[R]esident performance was monitored through regular evaluations, quizzes, and tests.").

The district court therefore correctly determined that residents at both the Mayo Foundation and University of Minnesota regularly attended classes. Pet. App. 38a n.8, 62a-64a.

B. The Regulations Unreasonably Exclude Medical Residents From The Student Exemption.

The regulations interpret the phrase "incident to and for the purpose of pursuing a course of education" to require that the educational aspect of a person's relationship with his or her school, college, or university to predominate over the service aspect of the relationship. Because there is no basis to make a categorical determination that the educational aspect of a medical residency *never* predominates over the service aspect, the regulations are unreasonable and therefore invalid. *See Chevron*, 467 U.S. at 843-44.

1. The Regulations' Treatment Of Medical Residents Is Inconsistent With The Accreditation Standards For Residency Programs.

By categorically excluding medical residents from the Student Exemption, the Treasury Department's regulations effectively presume that the service aspect of every residency program predominates over the educational aspect. If this presumption were actually true, no residency program could satisfy the requirements for accreditation set by the Accreditation Council for Graduate Medical Education ("ACGME"). Yet the vast majority of residency programs sponsored by Petitioners and *amici* are accredited by ACGME.[4] In total, more than 109,000 residents participated in 8,734 ACGME-accredited residency programs during the 2008-09 academic year. *See* ACGME, "ACGME At A Glance," http://www.acgme.org/acWebsite/newsroom/ataglance.pdf ("*ACGME At A Glance*").

ACGME was established in 1981 to evaluate and accredit medical residency programs in the United States. *Id.* It is a private, non-profit organization that was formed by the American Board of Medical Specialties, American Hospital Association, American Medical Association, Association of American Medical Colleges, and the Council of Medical Specialty Societies. *Id.* Each of these organizations appoints four members to

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[4] Accreditation is not available for some subspecialty programs. *See Mount Sinai*, 2008 WL 2940669, at *12.

ACGME's board of directors. *Id.* The board of directors also includes "two resident members, three public directors, the chair of the Council of Review Committees, one to four at large directors, and a non-voting federal representative." *Id.*

ACGME's mission "is to improve health care by assessing and advancing the quality of resident physicians' education." *Id.* Its standards are intended to ensure that "[d]idactic and clinical education must have priority in the allotment of the resident's time and energy." ACGME, *Common Program Requirements*, at 11 (July 1, 2007), http://www.acgme.org/acWebsite/dutyhours/dh_dutyhourscommonpr07012007.pdf ("*Common Program Requirements*"). To achieve these goals, ACGME has adopted minimum educational requirements that apply to all residency programs. *ACGME At A Glance* at 1. It has also established a Residency Review Committee for 26 different medical specialties. *Id.* These committees adopt additional requirements for their specialties, and they evaluate the programs within their specialties to determine whether they qualify for accreditation. To ensure that residency programs follow these standards, ACGME maintains a Department of Field Activities that conducts site visits to ensure compliance with ACGME standards. It made approximately 2000 site visits during the 2008-09 academic year. *See* ACGME, *2008-09 Annual Report* at 5, http://www.acgme.org/acWebsite/annRep/an_2008-9AnnRep.pdf.

An accredited residency program must have a program director in charge of ensuring that the program focuses on educating its residents. *See* ACGME, *Common Program Requirements*, at 1 (July

1, 2007), http://www.acgme.org/acWebsite/dutyhours/dh_dutyhourscommonpr07012007.pdf ("*Common Program Requirements*"). Under the accreditation standards, a program director must "administer and maintain an educational environment conducive to educating the residents." *Id.* at 2. The director must also "oversee and ensure the quality of didactic and clinical education." *Id.*

The accreditation standards set specific requirements for the faculty of a residency program. Each program must have a sufficient number of faculty members "to instruct and supervise all residents." *Id.* at 4. Moreover, "faculty must devote sufficient time to the educational program to fulfill their supervisory and teaching responsibilities; and to demonstrate a strong interest in the education of residents." *Id.* In addition to supervising residents in treating patients, faculty are required to participate in the other educational aspects of the residency program, including clinical discussions, journal clubs, and conferences. *Id.*[5]

The accreditation standards also require that a residency program have a formal curriculum. *Id.* at 6. The curriculum must set forth:

- "Overall educational goals for the program";

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[5] Some specialties expressly require faculty to be involved in "continuing scholarly activity," by serving on editorial boards or as reviewers for peer-reviewed journals. *See, e.g.*, ACGME, Program Requirements for Graduate Medical Education in Emergency Medicine, at 9, http://acgme.org/acWebsite/downloads/RRC_progReq/110emergencymed07012007.pdf.

- "Competency-based goals and objectives for each assignment at each educational level"; and

- "Regularly scheduled didactic sessions." *Id.*

Residents in accredited programs should participate in "scholarly activity." *Id.* at 9. To fulfill this requirement, "[t]he curriculum must advance residents' knowledge of the basic principles of research." *Id.* Moreover, the program should provide "adequate educational resources" to make this possible. *Id.* For example, the Mayo Foundation provides its residents with "one of the largest medical libraries in North America, computer facilities, laboratories, and classrooms." *Mayo I*, 282 F. Supp. 2d at 1001.

The accreditation standards limit the number of hours that residents can be on duty to ensure that their education has priority. Under the current standards, a resident's schedule is limited to 80 hours per week (not including reading and preparation time spent outside of the institution). *See Common Program Requirements* at 12. This limitation was adopted to ensure that the program's "learning objectives" are not "compromised by excessive reliance on residents to fulfill service obligations." *Id.* at 11.

2. The Regulations Fail To Account For the Educational Value Of Treating Patients.

The Treasury regulations acknowledge that the time medical residents spend treating patients

has "an educational, instructional, or training aspect." 26 C.F.R. § 31.3121(b)(10)-2(e), Ex. 4. The regulations nevertheless categorically exclude medical residents from the Student Exemption without considering, as they do for other activities, whether the educational aspect of patient care predominates over the service aspect. The Treasury Department's categorical refusal to consider the educational value of patient care is unreasonable.

Medical residents spend a significant amount of time treating patients because doing so is vitally important to their education. As the district court recognized, the clinical setting is the "principal classroom" for medical residents. Pet. App. 64a-65a. In many respects, there is simply no substitute for the experience gained in a clinical setting. No matter how many lectures a surgical resident attends, he or she cannot become a competent surgeon without spending time in the operating room.

In *Mayo I*, the district court recognized that "it is impossible to separate 'education' from 'patient care.'" 282 F. Supp. 2d at 1015. The court explained that "[a]ctual care in the service of patients is inherent in the educational process. It really cannot be separated from that. Playing just an observational role in this is not the same as actually being involved directly in patient care." *Id.* at 1014-15 (internal quotation marks and citations omitted).

Medical residents spend "the majority of their time learning how to care for patients under the watchful eye of a faculty physician." Pet. App. 64a. Residents treat patients, but their diagnoses and

treatment decisions must be approved by a staff physician. *Id.* Residents also learn in the clinical setting by "making rounds" with the staff physicians. "On rounds, the staff physician and residents would move from patient to patient; the staff physician would conduct didactic sessions with the residents both during and/or after rounds that would draw out and explain the salient educational points of each patient's condition." *Mayo I*, 282 F. Supp. 2d at 1003.

Many residency programs increase the educational value of patient care by minimizing the amount of administrative work that a resident must do. The *Mayo I* court explained:

> It is significant that the Foundation . . . seeks to ensure that allied healthcare personnel perform ancillary procedures that have no "educational value," such as drawing blood, starting IVs, setting up electrocardiograms, and scheduling tests. Residents at Mayo are not treated as a "cheap" source of labor, as the government has implied. By reducing the non-educational components of the residency programs to a minimum, [Mayo] sought to ensure that education, not service, was the focus of the residents' experience.

Id. at 1015 (internal citations omitted).

Universities and teaching hospitals recognize that a resident's primary purpose for treating patients is educational. They do not bill for the patient care provided by residents. *Mount Sinai*,

2008 WL 2940669, at 4. Nor will Medicare reimburse them for services performed by residents. *Id.* Indeed, if a hospital were concerned only with treating patients as efficiently as possible, it would not sponsor residency programs. As the district court noted, staff physicians could treat patients "in a more efficient and quicker fashion if they didn't have residents." Pet. App. 65a (internal quotations and citation omitted); *see also Mount Sinai*, 2008 WL 2940669, at *4 ("Faculty uniformly believe they can perform medical tasks more easily alone than while training the resident."). As a result, "[o]nly a minority of hospitals nationwide offer residency programs," and "[a]s a general matter, for-profit hospitals do not offer residency programs." *Id.* at *11 n.12.

In sum, having medical residents treat patients under the supervision of staff physicians is inefficient for hospitals but indispensable to the residents' education. As a result, the district court properly determined that residency programs are designed to "meet the educational needs of the resident, not the service needs of the hospital." Pet. App. 64a (internal quotation marks and citation omitted).

3. The Regulations Unreasonably Exclude Medical Residents From The Student Exemption Regardless Of How Much Time They Spend On Educational Activities.

If medical residents were on duty for only 39 hours per week, they would qualify for the Student Exemption under the Treasury Department's

regulations so long as the educational aspect of the residency program predominated over the service aspect. Once their schedule exceeds 39 hours, however, the regulations categorically exclude them from the Student Exemption. A medical residency program is primarily educational regardless of whether it takes more than 40 hours per week of the resident's time. The regulations are therefore invalid because they unreasonably exclude medical residents from the Student Exemption regardless of the educational content of their residency program, based solely on the fact that they are on duty for 40 or more hours per week. *See Chevron*, 467 U.S. at 843-44.

The unreasonableness of the regulations' categorical full-time employee rule is illustrated by other examples in the regulations. These examples demonstrate that the relative significance of the "educational" and "service" aspects of the relationship is not determined by comparing the number of hours spent on each activity. The regulations state that a graduate student with a "full-time course work-load" who works 20 hours per week as a teaching assistant qualifies for the Student Exemption. 26 C.F.R. § 31.3121(b)(10)-2(e), Ex. 8. This is true regardless of how many hours are required for a "full-time course work-load." In fact, a full-time course work-load for a graduate program is commonly *less* than 20 hours per week. For example, many of the Ph.D. programs offered by the Yale University Graduate School of Arts and Sciences require three or four courses (usually one or two hours per class) each semester during the students first two years of the program, and often no classes

after that point. *See* Yale University, *Graduate School of Arts and Sciences, Program and Policies 2010-2011* (July 15, 2010), http://www.yale.edu/printer/bulletin/htmlfiles/grad/graduate-school-of-arts-and-sciences-programs-and-policies-2010-2011.pdf. As a result, graduate students who work as teaching assistants often spend more time working than attending classes, but they nevertheless qualify for the Student Exemption. 26 C.F.R. § 31.3121(b)(10)-2(e), Ex. 8.

Even if a student were required to spend more time on educational activities than on service activities, the full-time employee rule would still be unreasonable. There is no basis for imposing a categorical presumption that medical residents spend more time on service activities than on educational activities. As discussed above, the time spent on patient care is properly categorized as education, not service. *See* Part II.B.2 *supra*. But even if patient care were treated as service, the regulations cannot presume that the service aspect necessarily predominates simply because a resident treated patients for 40 hours per week. Residents may be on duty for up to 80 hours per week, not including reading and preparation time spent outside of the institution. *See Common Program Requirements* at 12. Thus, a resident could spend 40 hours per week on service activities, while spending more than 40 hours per week on educational activities. As a result, the service aspect does not necessarily predominate simply because a resident spends 40 hours or more providing patient care.

Many of *amici*'s programs require a significant amount of time to be spent each week on educational

activities other than patient care. For example, residents in the internal medicine program at *amicus* Dartmouth-Hitchcock Medical Center devote between 10 and 15 hours per week to educational conferences. *See* "Educational Conferences," http://gme.dartmouth-hitchcock.org/im/educational_conferences.html. The conferences include:

- Rotational rounds (five hours per week);
- Residents' "morning report" (four hours per week);
- "Noon Conference Series" with lectures on core topics in general internal medicine (two hours per week);
- Journal Club (one hour per week);
- Morbidity and Mortality Conference (one hour per week); and
- Medical Grand Rounds (one hour per week). *Id.*[6]

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[6] This weekly schedule is not unusual for the residency programs sponsored by *amici*. The pathology residency at Johns Hopkins University requires residents to attend: (1) daily autopsy gross conferences; (2) daily and weekly multiheaded microscope and didactic conferences in autopsy and surgical pathology and in specialty areas; (3) twice weekly work rounds and weekly seminars in clinical pathology; (4) weekly didactic sessions in both Anatomic and Clinical Pathology; (5) weekly surgical pathology case conference; (6) weekly grand rounds; (continued...)

In addition to these courses, residents in *amici*'s programs also spend significant amounts of time conducting research. For example, *amicus* The George Washington University requires all residents in its primary care program and the vast majority of residents in its internal medicine program to complete a research project before graduation. *See* "Internal Medicine Residency," http://www.gwumc.edu/edu/medicine/residency/Administration/ProgramDirector.htm. Residents decide on a research topic during their first year. *Id.* During their second year, they work closely with their faculty advisors to refine their topic; they also gather data for their study. *Id.* During the final year, residents present their "work in progress" papers to the faculty and other residents, and prepare the papers for publication. *Id.*

In short, medical residents spend a substantial amount of time each week on educational activities. The fact that their schedule typically exceeds 40 hours per week provides no basis for categorically excluding them from the Student Exemption.

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and (7) research seminars. "Pathology Residency Programs," http://pathology.jhu.edu/department/training/residency.cfm.

CONCLUSION

The judgment of the court of appeals should be reversed.

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MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE UNIVERSITY OF TEXAS SYSTEM AS *AMICUS CURIAE* SUPPORTING PETITIONER

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20 C.F.R. § 404.1019(b) (1951) 34
20 C.F.R. § 404.1019(c) (1951) 34
20 C.F.R. § 404.1028 32
20 C.F.R. § 404.1028(b) (2009) 19
20 C.F.R. § 404.1028(c) (2009) 19, 22
26 C.F.R. § 31.3121(b)(10)-2(b) (2004) 32
26 C.F.R. § 31.3121(b)(10)-2(c) (2004) 20, 32
26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii) 5
26 C.F.R. § 31.3306(c)(10)(E)-1(b) (1956) 32, 34
26 C.F.R. § 31.3306(c)(10)(E)-1(c) (1956) 32, 34
26 C.F.R. § 403.221(b) (1944) 31
26 Fed. Reg. 26, 404 (Dec. 21, 2004) 27
69 Fed. Reg. 8604 (Feb. 24, 2004) 29

Miscellaneous:

Accreditation Council for Graduate Medical Education, *Policies & Procedures* (Feb. 10, 2010) 8
Accreditation Council for Graduate Medical Education, *Common Program Requirements* (effective July 1, 2007) 9
Accreditation Council for Graduate Medical Education, *Draft Common Program Requirements* (June 23, 2010) 9

Miscellaneous—Continued: Page

Centers for Medicare & Medicaid Servs., Dep't of Health & Human Servs., No. 100-04, *Medicare Claims Processing Manual (Mar. 12, 2010)* 37
Chen, Pauline W., M.D., *Someone to Watch Over Me*, N.Y. Times, June 24, 2010 10
Elstein, Arthur S., *Teaching Medicine: Process, Habits, and Actions*, 342 New Eng. J. Med. 1058 (2000) (book review) 12, 14
Flexner, Abraham, *Medical Education in the United States and Canada* (1910) 7, 24
House Study Group, Bill Analysis, H.67, Reg. Sess. (Tex. 1981) 16
H.R. Rep. No. 98-25 (1983), reprinted in 1983 U.S.C.C.A.N. 219 37
Hurst, J.W., *Thoughts About Teaching Ward Rounds on a Medical Service*, Resident & Staff Physician (Dec. 2007) 14, 24
Lai, Cindy, "Teaching as a Team," in *Hospital Medicine: Just the Facts* (Sylvia C. McKean et al. eds., 2008) 13
Meaning of "Temporary" Work under 8 U.S.C. § 1101(a)(15)(H)(ii)(B), 32 Op. O.L.C. 1 (2008) 29
Mountain Area Health Educ. Center, *Teaching at the Bedside* (2001) 13

Miscellaneous—Continued: Page

Nasca, Thomas J., et al., *The New Recommendation on Duty Hours from the ACGME Task Force*, 363 New Eng. J. of Med. e3(2) (2010) 9

Press Release, Internal Revenue Service, *IRS to Honor Medical Resident FICA Refund Claims* (Mar. 2, 2010) 21

Staff of Subcomm. on Soc. Sec. of H. Comm. on Ways and Means, *Termination of Soc. Sec. Coverage for Emps. of State & Local Gov'ts & Nonprofit Grps.*, 97th Cong., 2d Sess. (Comm. Print 1982) 17

Texas Higher Educ. Coordinating Bd., *Funding Graduate Medical Education in Texas* (Aug. 23, 2004) 36

U.S. Gov't Accounting Office, B-284947, *Social Security: Coverage for Medical Residents* (2000) 19

U.S. Gov't Accountability Office, GAO-09-438R, *Graduate Medical Education: Trends in Training & Student Debt* (May 4, 2009) 22, 35, 36

In the Supreme Court of the United States

No. 09-837

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNIVERSITY OF TEXAS SYSTEM AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF THE AMICUS CURIAE[1]

Amicus the University of Texas System (the "UT System") is a public higher education system comprising nine academic universities and six health in-

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae* and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

stitutions. The UT System health institutions (the "Medical Centers") operate medical schools as well as graduate medical education programs for medical school graduates to complete medical residencies and fellowships. UT System medical schools granted 819 medical degrees in 2009, representing over 70% of the physicians graduated from Texas's public medical schools that year. Approximately 3,455 medical residents were enrolled in the UT System in September 2009, representing almost 80% of physicians being educated at public health-related institutions in Texas.

Texas law requires the State's public universities to compensate their medical residents while they are "being educated, trained, developed, and prepared for a career in medicine." Tex. Educ. Code § 58.001(b). Those stipends would be subject to Federal Insurance Contribution Act ("FICA") tax unless they come within an applicable exemption under 26 U.S.C. § 3121(b). The exemption at issue in this case, 26 U.S.C. § 3121(b)(10) (the "Student Exemption"), provides one basis for exempting the wages of the UT Medical Centers' residents from FICA tax. As set forth below, their wages also are exempt on a second basis, because they are excluded from the group of state employees who are covered by an agreement to provide Social Security benefits entered into under 42 U.S.C. § 418 (a "Section 418 agreement"). See 26 U.S.C. § 3121(b)(7)(E), (F). The Internal Revenue Code ("I.R.C.") recognizes that Section 418 agreements control the collection of FICA tax with respect to such employees.

On behalf of five of its Medical Centers, the UT System is currently seeking a refund of over $10.2 million in FICA taxes that it paid and withheld from its medical residents in 2005. See *Univ. of Tex. Sys.* v. *United States*, No. 1:09-cv-665 (W.D. Tex. filed Sept. 9, 2009). The UT Medical Centers also have filed with the Internal Revenue Service ("IRS") requests for refunds of additional FICA taxes paid in later years. The UT System and its Medical Centers thus have a substantial interest in the outcome of this case.

SUMMARY OF ARGUMENT

Residents in the UT Medical Centers' residency programs are "students" in every sense of the word. They are enrolled in an accredited course of study in graduate medical education, which has a formal academic curriculum and which requires reading assigned texts, attending lectures, and participating in teaching rounds, grand rounds, morbidity and mortality conferences, and journal clubs. Residents must perform adequately on rigorous, regular examinations to be promoted and to complete the program. Underscoring that they participate in the residency program to pursue a course of study rather than to earn a livelihood, residents' stipends represent a fraction of what physicians outside such programs earn. The Texas Legislature has formally concluded that residents in state programs are "undergoing education" to practice as physicians. Tex. Educ. Code § 58.0001(a).

The I.R.C. Student Exemption is only one possible FICA exception applicable to medical residents at

public universities. The wages of UT Medical Center residents also are exempt from FICA taxes under the I.R.C. exemption for state employees whom a State has not voluntarily included in the Social Security system under an agreement entered into under 42 U.S.C. § 418. Section 418 specifically provides that such agreements "shall, if the State requests it, exclude * * * service performed by a student." The implementing Social Security regulations are substantively identical to the pre-amendment Treasury regulations, which have uniformly been construed to make medical residents eligible for the Student Exemption. Even the IRS now acknowledges those regulations exempt medical residents from FICA taxation. Although the IRS disparages residencies as "on-the-job training," residencies are not designed to train the resident on the day-to-day duties of the current rotation, but to broadly educate the resident to prepare for autonomous, unsupervised practice. The Amended Regulation, which by its terms construes the I.R.C. rather than the Social Security Act, does not affect residents' eligibility for the Section 418 exemption. Courts have concluded that the States determine what groups are exempt under Section 418 agreements and agencies lack authority to affect their choices by regulation.

The Amended Regulation is an unreasonable interpretation of I.R.C. § 3121(b)(10). It abruptly departed from the consistent interpretation given to virtually identical language by both the IRS and the Social Security Administration for over a half-century, and ignores Congress's purposeful deletion of an income cap for the Student Exemption, con-

firming its application is not limited to minor, incidental services. Congress's decision to allow States to exclude students from their Section 418 agreements, which came in the wake of an influential decision holding that the Section 418 student exclusion applies to medical residents, *Minnesota* v. *Apfel*, 151 F.3d 742 (8th Cir. 1998), underscores Congress's agreement with that conclusion. Finally, Medicare reimbursement rules, which provide teaching institutions graduate medical education payments to offset the higher costs of providing care in connection with residency programs, recognize such programs principally serve an educational rather than patient-care function. The rules recognize supervising faculty as "teaching physician[s]," and with limited exceptions, do not permit reimbursement unless services were personally furnished by a physician who is not a resident, or the physician was physically present to supervise during the critical portion of the procedure.

ARGUMENT

The Federal Insurance Contributions Act, 26 U.S.C. § 3101 *et seq.*, requires employers and employees to pay taxes on "wages" from "employment" in order to fund the Social Security and Medicare programs. *Id.* §§ 3101, 3102, 3111. This case involves the proper interpretation of 26 U.S.C. § 3121(b)(10) and the validity of the 2004 amendment to the Treasury regulation interpreting that provision, see 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii) (the "Amended Regulation"). The Student Exemption in the Internal Revenue Code excludes from FICA taxes "service performed in the employ of a

school, college, or university." I.R.C. § 3121(b)(10)(A). The Amended Regulation categorically excludes medical residents from eligibility for the Student Exemption by denying it to individuals who normally work 40 or more hours per week. *Amicus* the UT System broadly agrees with petitioners that medical residents in accredited residency programs qualify for the FICA Student Exemption and that the Amended Regulation categorically excluding them from eligibility is invalid.

The Student Exemption is, however, only one of two exemptions potentially applicable to medical residents in *public* university graduate medical education programs. When considering the (b)(10) exemption, it is useful to consider the context of a *separate* I.R.C. exemption applicable to medical residents in State-run programs. As discussed below, the wages of UT System medical residents are exempt from FICA taxes under the I.R.C. exemption for state employees who are not voluntarily included within the Social Security system under agreements entered into pursuant to 42 U.S.C. § 418. See I.R.C. § 3121(b)(7)(E), (F).

I. UT Medical Center Residents Are Students

A. Article VII of the Texas Constitution of 1876 provided that "[t]he Legislature shall, as soon as practicable, establish, organize, and provide for the maintenance, support, and direction of a university of the first class, to be * * * styled 'The University of Texas.'" Tex. Const., § 10, art. VII. In 1881, the Legislature established the University of Texas as "an institution of learning," to include a "medical de-

partment." At the time, the need for medical education in Texas was acute; 80% of doctors there had less than one year of formal medical education. The Medical Department opened in October 1891 with thirteen faculty members and twenty-three students. The University added a school of pharmacy in 1893 and assumed responsibility for the John Sealy Hospital Training School for Nurses in 1896. By the time Abraham Flexner published his seminal 1910 study of American medical education, he concluded that the University's medical school was the only one in Texas "fit to continue in the work of training physicians." Abraham Flexner, *Medical Education in the United States and Canada* 312 (1910) ("Flexner Report"), available at http://www.carnegiefoundation.org/sites/default/files/elibrary/Carnegie_Flexner_Report.pdf

Today, the UT System comprises six Medical Centers with 8,403 faculty teaching 15,715 students, including residents. Through more than a century of change, the education of physicians, nurses, and other health professionals has remained the central mission of the UT Medical Centers, which have been recognized for excellence in teaching and research.

B. One central aspect of the UT System's graduate medical education program is the education of medical residents. The Accreditation Council for Graduate Medical Education ("ACGME"), the accrediting body for all UT System residency programs (and most U.S. medical residencies), defines a "residency program" as "a structured educational activity comprising a series of learning experiences in [graduate medical education] designed to conform to

the program requirements of a particular specialty." ACGME, *Policies & Procedures* 96 (Feb. 10, 2010). The UT Medical Centers operate residency programs in a host of fields. While the precise requirements of residency programs vary somewhat based on specialty and school, residents in the UT System—like residents in accredited residency programs nationwide—are not simply "full-time employee[s] who learn[] by doing," as the government contends. Br. in Opp. 10. While residency programs necessarily involve a clinical education component that entails the treatment of patients, UT System residencies are rigorous academic courses of study and the residents who undertake them are "students" in every sense of the word. See, *e.g.*, *Webster's Third New International Dictionary* 2268 (1971) ("**1.** a person engaged in study: one devoted to learning; as **a:** one enrolled in a class or course in a school, college, or university: pupil").

1. ACGME establishes exacting common accreditation standards for all residency programs (supplemented by standards for particular specialties), which rest on the basic principle that "[d]idactic and clinical education *must have priority* in the allotment of the resident's time and energy" and "[t]he learning objectives of the [residency] program must not be compromised by excessive reliance on the residents to fulfill [non-physician] service obligations." ACGME, *Common Program Requirements* 11 (effective July 1, 2007) (emphasis added), available at http://www.acgme.org/acwebsite/dutyhours/dh_dutyhourscommonpr07012007.pdf. The standards require each program to set "[c]ompetency-based goals

and objectives" for each educational level, *id.* at 6, and the program must ensure that residents develop required competencies in "established and evolving biomedical, clinical, epidemiological and social behavioral sciences, as well as the application of this knowledge to patient care," *id.* at 7, that they develop a demonstrated "ability to investigate and evaluate their care of patients, to appraise and assimilate scientific evidence," *ibid.*, and learn to "communicate effectively with patients, families, and the public." *Id.* at 8.

In addition to clinical education, the standards require formal instruction through "[r]egularly scheduled didactic sessions." *Id.* at 6. To further the educational process, the "faculty must evaluate resident performance in a timely manner during each rotation or similar educational assignment" using objective assessments from multiple evaluators. *Id.* at 10. The ACGME standards are enforced through exacting accreditation requirements and periodic program reviews. Failure to fulfill these standards can result in loss of accreditation. Many residency programs have lost accreditation (or been granted only conditional accreditation) over the years.

In June of this year, ACGME released new proposed standards for comment that underscore residency programs' principal focus on education. See ACGME, *Draft Common Program Requirements* (June 23, 2010), available at http://acgme-2010standards.org/pdf/Proposed_Standards.pdf; see also Thomas J. Nasca et al., *The New Recommendation on Duty Hours from the ACGME Task Force*, 363 New Eng. J. of Med. e3(2), e3(6) (2010), available

at http://content.nejm.org/cgi/reprint/363/2/e3.pdf. Those revised standards, which are expected to go into effect in July 2011, also emphasize the "necessity of effective and well-tailored supervision" by faculty to oversee clinical education. Pauline W. Chen, M.D., *Someone to Watch Over Me*, N.Y. Times, June 24, 2010, available at http://www.nytimes.com/2010/06/24/health/24chen.html.

2. The UT Medical Centers' residency programs are rigorous courses of clinical and didactic education. They are accredited by ACGME and subject to thorough periodic reviews. Like other students, residents in the programs are enrolled as students at the UT Medical Centers and subject to a formal curriculum.[2] They read assigned texts,[3] receive regular didactic lessons, including teaching rounds,[4] attend

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[2] See UT Health Science Ctr. at Houston Med. Sch., Dep't of Internal Med. Residency Program Curriculum, Rotation Educational Goals and Objectives ("UTHSC Houston Internal Medicine Residency Curriculum"), available at http://www.uth.tmc.edu/schools/med/imed/Assets/pdf/internal_medicine_curriculum_acgme.pdf.

[3] See, *e.g.*, UT Southwestern Med. Ctr., Ob/Gyn Residency – Educational Curriculum, available at http://www8.utsouthwestern.edu/utsw/cda/dept22001/files/46301.html; UTMB Dep't of Orthopaedic Surgery and Rehabilitation, Orthopaedic Residency Program, available at http://www.utmb.edu/ortho/residency/didactics.htm.

[4] See, *e.g.*, UT Health Science Ctr. at Tyler, Family Med Residency Program Curriculum, available at http://www.uthct.edu/education/medicaled/gme/family/curriculum.asp; UT Health Science Ctr. San Antonio, Pediatrics Residency Program Overview, available at http://www.pediatrics.uthscsa.edu/residency/program.asp.

lectures, grand rounds,[5] and morbidity and mortality conferences,[6] and participate in journal clubs to learn about medical advances reported in current academic literature.[7] Some programs also involve residents in research.[8]

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[5] See, *e.g.*, UT Health Science Ctr. San Antonio, Anesthesia Residency Didactic Program ("UTHSCSA Anesthesia Residency Didactic Program"), available at http://anesthesia.uthscsa.edu/Education/Residency/DidacticProgram.aspx; UT Med. Sch. at Houston, Dep't of Neurology Residency Training Program, available at http://neurology.uth.tmc.edu/residency/index.htm; UT Southwestern Med. Ctr., Neurology Residency Didactic Curriculum, available at http://www.utsouthwestern.edu/utsw/cda/dept21330/files/304694.html ("The Neurology residency didactic curriculum consists of 20 courses (4 weeks each). Each course consists of 10 to 12 lectures."); UT Southwestern Med. Ctr., Dep't of Neurology: Grand Rounds Schedule, available at http://www.utsouthwestern.edu/utsw/cda/dept14802/files/97263.html

[6] See, *e.g.*, UT Southwestern Med. Ctr., Neurological Surgery Residency Program, available at http://www4.utsouthwestern.edu/swneurosurg/body_residency_program.html; UTMB Obstetrics and Gynecology Resident Handbook 112 (2009-2010), available at http://www.utmb.edu/obgyn/residency/ObGynHandbook2009_2010.pdf.

[7] See, *e.g.*, UT Med. Sch. at Houston, Emergency Med. Residency Program Didactic Curriculum, available at http://www.uth.tmc.edu/uth_orgs/emer_med/residency/didactic_curriculum.html; UT Southwestern Med. Ctr., Physical Med. & Rehabilitation Residency Program Overview, available at http://www.utsouthwestern.edu/utsw/home/resfellow/pmr/index.html.

[8] See, *e.g.*, UT Southwestern Med. Ctr., Pathology Residency Program: Goals and Objectives by Level of Training, available at http://www.utsouthwestern.edu/utsw/cda/dept25107/files/400858.html; UT M.D. Anderson Cancer Ctr., Radiation Oncology Residency Program, available at http://www.mdanderson.org/education-and-research/education-

Grand rounds and teaching rounds are particularly valuable tools of graduate medical education. Grand rounds are a type of intensive classroom education, a regularly scheduled

> interactive presentation or series of educational seminars that focus on clinical cases, recent biomedical or behavioral research results, or a review of scientific research methods and findings in a specific field, with supporting basic and clinical science information, that are conducted * * * to evaluate outcomes of patient treatment decisions, * * * discuss clinical decision making, and * * * impart updates in diagnosis, treatment, therapy, and research.

5 C.F.R. § 5501.109(b)(6) (2010). The case-study format is effective "because doctors remember facts and principles that are linked to patients, especially their own patients, more easily than facts disconnected from their own experience." Arthur S. Elstein, *Teaching Medicine: Process, Habits, and Actions*, 342 New Eng. J. Med. 1058, 1059 (2000) (book review). Grand rounds are therefore a more effective teaching method than topical lectures disconnected from actual cases.

Teaching rounds provide a similarly intensive educational experience in the clinical context. During teaching rounds, the resident (in the company of other residents and often medical students) presents

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and-training/schools-and-programs/medical-education/graduate-medical-education/residency-and-fellowship-programs/radiation-oncology-radiation-oncology-residency-program.html.

individual cases to the attending faculty member, including information about the patients' history, physical examination, clinical data, and pathophysiology. The attending physician then leads the resident through a differential diagnosis and discusses an appropriate management plan for the patient. Teaching in this context has several distinct advantages. First,

> [t]he presence of the patient strengthens the learning possibilities. As opposed to listening to a presentation or reading off a blackboard, learners have the opportunity to use nearly all of their senses * * * to learn more about the patient and [his] problems. The sterile facts and descriptions from a sterile presentation come alive and are tangible. These characteristics alone can help the learner remember the clinical situation. * * * These experiences create hooks upon which a great deal of clinical learning can be hung for long-term storage and ready recall.

Mountain Area Health Education Center, *Teaching at the Bedside* (2001), available at www.mahec.net/celt/acrorcad/Teaching-Bedside.pdf; accord Cindy Lai, "Teaching as a Team," in *Hospital Medicine: Just the Facts* 622 (Sylvia C. McKean et al. eds., 2008). In addition, the resident is able to learn interview and physical examination techniques from the faculty member. Second, faculty typically employ the Socratic method to develop the resident's reasoning ability, "not telling them the answers[,] but asking questions that cause them to think about the causes of disease manifestations, and seriously fostering the development of their clinical skills,"

Elstein, *supra*, at 1059, and also allowing faculty to assess the resident's knowledge. Teaching rounds are "perhaps the most important teaching activity" in a teaching hospital because they "challenge trainees to translate their medical knowledge into the care of the patient in a humane manner." J.W. Hurst, *Thoughts About Teaching Ward Rounds on a Medical Service,* Resident & Staff Physician (Dec. 2007), available at http://www.hcplive.com/general/publications/Resident-and-Staff/2005/2005-03/2005-03_03.

Under the direction of experienced attending physician faculty members, medical residents interact with that physician's patient to provide a didactic experience the faculty member uses to educate the resident about particular conditions and general principles of treatment. Patient interaction is undertaken to educate the resident sufficiently to enable him or her to operate independently as an unsupervised physician once the residency is finished. Underscoring the educational value of patient treatment, the attending physician frequently teaches the residents alongside medical school students.

Residents are regularly subject to rigorous examination to test their knowledge --in morbidity and mortality conferences,[9] during rounds,[10] through

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[9] See, *e.g.*, UT Southwestern Med. Ctr., Neurological Surgery Residency Program, *supra* note 6; UTHSCSA Anesthesia Residency Didactic Program, *supra* note 5.

[10] See, *e.g.*, UTHSC Houston Internal Med. Residency Curriculum, *supra* note 2, at 8, 11, 14, 15.

mock oral examinations,[11] and through formal examinations.[12] Promotion to the residency's next level is "based on achievement of the program-specific competence and performance parameters," including "specific cognitive, clinical, and technical skills." Department of Anesthesiology, Univ. of Texas Health Science Center San Antonio, "Policy on Promotion." Residents who do not achieve the required academic standards will be required to undergo additional education to obtain full credit towards completion of the residency program. *Id.* Residents who persistently fail to satisfy the required standards may be asked to leave the program.

Texas has recognized that graduate medical education is essential for a practicing physician; Texas law requires physicians to have at least one year of graduate medical education to be eligible for full licensure, which is a prerequisite to practicing medicine in the State. See 22 Tex. Admin. Code § 163.2(a)(5).[13] When the Texas Legislature enacted legislation in 1981 requiring its public universities to

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[11] See, *e.g.*, UTHSCSA Anesthesia Residency Didactic Program, *supra* note 5; UT Health Science Ctr. San Antonio, General Surgery Residency Program, available at http://www.surgery.uthscsa.edu/education/residencies/generalsurgery/index.asp.

[12] See, *e.g.*, UT Southwestern Med. Ctr., PM&R Resident Didactics, Research, and Evaluations, available at http://www.utsouthwestern.edu/utsw/cda/dept126096/files/126156.html; UTMB Obstetrics and Gynecology Resident Handbook, *supra* note 6, at 115.

[13] In addition, to sit for exams to attain board certification, a physician must have completed an accredited residency program in the relevant field.

pay medical residents stipends, it recognized that residents were "undergoing education, training, development, and preparation" to work as physicians. Tex. Educ. Code § 58.001(a), (b). As the legislative history of that law reflects, "[t]he medical schools and teaching hospitals are the training ground for doctors who serve 254 Texas counties." House Study Group, Bill Analysis, H.67, Reg. Sess. at 2. (Tex. 1981), available at http://www.lrl.state.tx.us/scanned/hroBillAnalyses/67-0/SB89.pdf.

II. The Section 418 Regime Permits States To Exclude Residents At State Institutions From FICA Taxes

The Student Exemption created by I.R.C. § 3121(b)(10) is only *one* basis for exempting the wages of medical residents in State-operated programs from FICA taxes. When considering the (b)(10) exemption, it is useful to consider the context of a *separate* I.R.C. exemption applicable to medical residents in State-run programs, and under which UT System medical residents are exempt from FICA taxation: the exemption for "service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned thereby." I.R.C. § 3121(b)(7). Wages from such service are exempt unless they are made subject to taxation as "service included under an agreement entered into pursuant to section 218 of the Social Security Act [42 U.S.C. § 418]." *Id.* § 3121(b)(7)(E).

A. Section 418 Authorizes States' Voluntary Participation In Social Security

When originally enacted, "'[t]he Social Security Act of 1935 excluded from coverage all employment for States and localities,'" principally because "Congress faced questions as to whether it could compel the States and their political subdivisions to include their employees in the [Social Security] System." *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 44 & n.4 (1986) (quoting Staff of Subcomm. on Soc. Sec. of H. Comm. on Ways and Means, *Termination of Soc. Sec. Coverage for Emps. of State & Local Gov'ts & Nonprofit Grps.*, 97th Cong., 2d Sess., at 20 (Comm. Print 1982)). Thus, the Social Security Act—mirroring the language of I.R.C. § 3121(a)(7)—generally exempts from the definition of "employment," for purposes of federal old-age, survivors, and disability insurance benefits, "[s]ervice performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned thereby." 42 U.S.C. § 410(a)(7).

In 1950, responding to States that wished to obtain Social Security coverage for their employees, Congress enacted 42 U.S.C. § 418. *Bowen*, 477 U.S. at 44-45; Social Security Act Amendments of 1950, Pub. L. No. 81-734, § 106, 64 Stat. 477, 514-17. That provision "authorizes voluntary participation by States in the Social Security System." *Bowen*, 477 U.S. at 45. "[A]t the request of any State," the Commissioner of Social Security "shall" execute an agreement providing for Social Security coverage,

whose provisions shall be "not inconsistent with the provisions of" Section 418. 42 U.S.C. § 418(a)(1). Section 418 essentially creates an "opt-in" system under which employees covered by a Section 418 agreement are furnished Social Security and Medicare benefits and pay corresponding FICA taxes. Though I.R.C. § 3121(b)(7) and 42 U.S.C. § 410(a)(7) generally exclude from FICA taxation and Social Security benefits "service performed in the employ of a State," those provisions do not apply to "service included under an agreement entered into pursuant to" Section 418. I.R.C. § 3121(b)(7)(E); 42 U.S.C. § 410(a)(7)(A).

Section 418 permits States generally to identify which groups of employees they wish to cover under the agreement. 42 U.S.C. § 418(c)(1); *Bowen*, 477 U.S. at 45. All States, Puerto Rico, the Virgin Islands, and approximately 60 interstate instrumentalities have entered Section 418 agreements with the Social Security Administration ("SSA"). See SSA, *Section 218 Agreements*, available at https://www.ssa.gov/slge/sect_218_agree.htm (last visited July 21, 2010). During the late 1970s, when Congress became concerned that States were terminating coverage for employees at rates that caused concern about the "integrity of the System," *Bowen*, 477 U.S. at 46-47, it amended the Social Security Act to provide that no Section 418 agreement "may be terminated, either in its entirety or with respect to any coverage group, on or after [April 20, 1983]." Social Security Amendments of 1983, Pub. L. 98-21, § 103, 97 Stat. 71-72.

B. Section 418 Allows States To Exclude Student Employees From FICA

The Social Security Act specifically provides that a Section 418 agreement "shall, if the State requests it, exclude * * * service performed by a student." 42 U.S.C. § 418(c)(5). Most States have excluded student services under their Section 418 agreements. See U.S. Gov't Accounting Office, B-284947, *Social Security: Coverage for Medical Residents* 12 (2000). However, that provision is applicable only if that student service is excluded from the definition of "employment" by "any provision of [42 U.S.C.] section 410(a) other than [§ 410(a)](7)," the general exclusion for "[s]ervice performed in the employ of a State." See 42 U.S.C. § 418(c)(5). An obvious basis is the Social Security Act's own student exemption, 42 U.S.C. § 410(a)(10)(A), which exempts from the definition of "employment" "[s]ervice performed in the employ of a school, college, or university."

The SSA's regulations implementing § 410(a)(10)(A)—like both the old and new regulations implementing I.R.C. § 3121(b)(10)—exempt from the definition of "employment" "any work you do as an employee of a school, college, or university * * * , if you are enrolled in and regularly attending classes [there]." 20 C.F.R. § 404.1028(b) (2009). The regulations explain that "[w]hether you are a student for purposes of this section depends on your relationship with your employer. If your main purpose is pursuing a course of study rather than earning a livelihood, we consider you to be a student and your work is not considered employment." *Id.* § 404.1028(c). That language is substantively iden-

tical to that contained in the corresponding Treasury regulations before the 2004 amendment. See 26 C.F.R. § 31.3121(b)(10)-2(c) (2004).

Federal courts of appeals uniformly have interpreted the SSA and pre-amendment Treasury regulations to make medical residents eligible for "student" exemptions. See, *e.g.*, *United States* v. *Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27 (2d Cir. 2009); *United States* v. *Detroit Med. Ctr.*, 557 F.3d 412, 414 (6th Cir. 2009); *Univ. of Chi. Hosps.* v. *United States*, 545 F.3d 564, 568-69 (7th Cir. 2008); *United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1252 (11th Cir. 2007); *Minnesota* v. *Apfel*, 151 F.3d 742, 747-48 (8th Cir. 1998). Indeed, the seminal case of *Minnesota* v. *Apfel* concerned the eligibility of medical residents for exemption under Minnesota's Section 418 agreement.

By 2000, the IRS took the position that a resident could qualify as "a student depend[ing] upon examination of all the facts and circumstances," and that the student FICA exemption was available "with respect to students who are enrolled and regularly attending classes," Memorandum from Mary Oppenheimer, Assistant Chief Counsel, for Steven T. Miller, Director, Exempt Organizations, IRS, at 30 (Apr. 19, 2000) ("Oppenheimer Memo"), available at http://www.irs.gov/pub/irs-wd/0029030.pdf, defined broadly to include "demonstrations, tutorials, and teaching rounds at which a faculty member plays a leadership role." *Id.* at 27. Earlier this year, the IRS announced that it would "accept the position that medical residents are excepted from FICA taxes based on the student exception for tax periods end-

ing before" the effective date of the Amended Regulation. See Press Release, Internal Revenue Service, *IRS to Honor Medical Resident FICA Refund Claims* (Mar. 2, 2010), available at http://www.irs.gov/pub/irs-tege/nr-2010_25.pdf.

C. Texas's Section 418 Agreement Excludes The UT Medical Centers' Residents From FICA Taxation

When originally signed in 1951, Texas's Section 418 agreement (the "Agreement") did not provide any State employees Social Security coverage. See Texas Section 418 Agreement (1951). In 1955, the State modified the Agreement generally to cover State employees, including employees of Texas's public colleges and universities. See *id.*, Modification No. 130 (1955). In late 1998, Congress temporarily authorized the States to modify their Section 418 agreements, notwithstanding the prohibition on terminating "any coverage group," 42 U.S.C. § 418(f), so any States that had not already done so could "exclude service performed in the employ of a school, college, or university" by an enrolled student who is attending classes. Pub. L. No. 105-277, § 2023(a), 112 Stat. 2681, 2681-904 (1998). Texas modified its Agreement to "exclude from coverage service performed after June 30, 2000, in the employ of a school, college or university if such service is performed by a student who is enrolled and regularly attending classes at said school, college or university." See Texas Section 418 Agreement, Modification No. 1496 (1999). That modification specifically excludes from Social Security coverage "student em-

ployees of * * * [t]he University of Texas System" and its Medical Centers. *Ibid.*

Medical residents at UT Medical Centers are "students" within the meaning of the Agreement, Section 418, and its implementing regulations. Under those regulations, the touchstone of the inquiry is the medical resident's relationship with the employer. It is clear that a resident's "main purpose" for participating in the UT Medical Centers' residency program "is pursuing a course of study rather than earning a livelihood." 20 C.F.R. § 404.1028(c). To begin with, residents' stipends—which average $50,000 per year or less—are well below the market rate physicians of the same medical school class could command practicing outside residency programs.[14] See generally U.S. Gov't Accountability Office, *supra* note 14, at 33 (noting that median income for primary care physicians is $182,322, and $332,450 for procedural and surgical specialties). The students are drawn to residencies not for their relatively modest stipends, but for the educational experience they offer. The stipends simply provide "a minimum standard of living during the period of time that [they] are engaged in their education."

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[14] See, e.g., Southwestern Med. Ctr., Otolaryngology Resident Benefits & Compensation, available at http://www8.utsouthwestern.edu/utsw/cda/dept28151/files/118190.html; UTMB, Graduate Med. Educ., Resident Salary, available at http://www.utmb.edu/gme/salary/default.htm; U.S. Gov't Accountability Office, GAO-09-438R, *Graduate Medical Education: Trends in Training & Student Debt* 4, 32 (May 4, 2009) (nationally, average first-year resident stipend is $44,748 annually), available at http://www.gao.gov/new.items/d09438r.pdf.

United States v. *Mount Sinai Med. Ctr. of Fla., Inc.*, No. 02-22715-CIV, 2008 WL 2940669, at *6 (S.D. Fla. July 28, 2008) (internal quotation marks omitted). The Medical Centers' residents also are enrolled as students. They participate in substantial and rigorous academic coursework, reading assigned texts, participating in journal clubs to learn of recent developments in medicine, participating in teaching rounds, grand rounds, and morbidity and mortality conferences, and attending lectures. The curriculum for one typical UT residency, for example, runs nearly *150 pages*. UTHSC Houston Internal Medicine Residency Curriculum, *supra* note 2. Like students in other programs, residents are regularly examined to test their mastery of the subject, and are subject to removal from the program if they fail to achieve academic goals. See *supra*, at 10-15. Their entire course of study, including specifically their interaction with patients, is supervised by the UT Medical Centers' faculty.

In arguing that residents are simply "full-time employees," the government emphasizes their role in providing patient care. But as explained above, the attending physician is responsible for patient care, and the residents' interaction with patients is in the context of a didactic exercise. "[T]he principal classroom for residents must be the clinical setting because patient care in a medical specialty is what residents are receiving training for." *United States* v. *Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 1015 (D. Minn. 2003). The education of physicians necessarily involves interaction with patients to develop the skills, knowledge, and habits

needed to engage in the unsupervised practice of medicine outside the residency program. Residents are "still in school" and need "3 to 6 years of training * * * to attain the skills to function alone." Hurst, *supra*. As Abraham Flexner wrote a century ago, in his influential study of medical education:

> The student no longer merely watches, listens, memorizes; he *does*. His own activities in the laboratory and in the clinic are the *main factors* in his instruction and discipline. An education in medicine nowadays involves both learning and learning how; the student cannot effectively know, unless he knows how.

Flexner Report 53 (second emphasis added). Those words are just as true in 2010, as the ACGME's Draft Common Program Requirements confirm: "The specialty education of physicians to practice independently is experiential, and necessarily occurs within the context of the health care delivery system." *Draft Common Program Requirements, supra*, at 1; see also Oppenheimer Memo at 27 (stating "teaching rounds" "may be considered classes" for Student Exemption).

Although the government has at times disparaged residency as mere "on-the-job training," see Br. in Opp. 5, that characterization is baseless. "[O]n-the-job training" is designed narrowly to prepare permanent employees to perform their present and immediate future duties. The residency curriculum is not narrowly focused to train the resident in the day-to-day duties of the resident's current rotation, but is broadly designed to educate him or her on the

entire field of study to prepare for autonomous, unsupervised practice. Employers hope to retain employees so they can recoup the expense of "on-the-job training"; the whole point of a residency is to prepare residents to leave the program and begin practicing independently. Only a small fraction of the doctors educated in a residency program are retained as faculty in that program or as staff physicians at the hospital where they did their residency. By design, the vast majority of the education imparted by a residency's faculty will not be "captured" by the program itself.

The Fifth Circuit has held in another context that "[i]t is well-known that the *primary purpose* of a residency program is not employment or a stipend, but the academic training and the academic certification for successful completion of the program." *Davis* v. *Mann*, 882 F.2d 967, 974 (5th Cir. 1989) (holding that dismissal from residency program is an academic rather than employment dismissal for due process purposes); accord *Fenje* v. *Feld*, 398 F.3d 620, 624-27 (7th Cir. 2005); *Ezekwo* v. *N.Y. City Health & Hosps. Corp.*, 940 F.2d 775, 783-85 (2d Cir. 1991). The Texas legislature similarly has concluded that, during their residency, medical residents are "being educated * * * for a career in medicine." Tex. Educ. Code § 58.001(b). Medical Residents are "students" in every relevant sense.

Moreover, Congress's legislative action suggests its intent to include residents within the scope of the Social Security Act's student exemption. In *Apfel*, the Eighth Circuit held that the University of Minnesota's medical residents were "students" under the

SSA regulations and the State's Section 418 agreement and thus were not subject to FICA taxes because "the primary purpose for the residents' participation in the program is to pursue a course of study rather than to earn a livelihood." 151 F.3d at 748. Several months after the decision in that influential case, Congress enacted legislation permitting States to amend their Section 418 agreements to exclude "service performed [by a student] in the employ of a school, college, or university." See § 2023(a), 112 Stat. at 2681-904. That amendment was roughly contemporaneous with IRS action recognizing the eligibility of residents for the Social Security Act's FICA exemption. See Oppenheimer Memo, *supra*. This enactment thus suggests that Congress ratified the understanding of the student exemption reflected in *Apfel* and the then-existing Treasury and SSA regulations. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-86 (2006).

D. The Amended Regulation Does Not Affect Texas's Decision To Exclude Medical Residents From Its Section 418 Agreement

The Amended Regulation does not affect whether medical residents are covered by Texas's Section 418 Agreement, because the regulation is not used in applying the relevant I.R.C. exemption. The I.R.C. exemption for Section 418 agreements does not turn on the I.R.C.'s meaning of "student," which is the subject of the Amended Regulation. Rather, the exemption requires only that the "service [be] performed in the employ of a State, or any political subdivision thereof," and the service is not made subject to FICA

tax "under an agreement entered into pursuant to section [4]18." I.R.C. § 3121(b)(7)(E). Neither the I.R.C. nor the Treasury regulations bears on either of those issues, which are instead addressed by the Social Security Act, the SSA regulations, and Texas's Section 418 Agreement.

Indeed, the Amended Regulation, by its own terms, does not purport to interpret the Social Security Act or to affect the meaning of Section 418 agreements. The Federal Register notice for the final rule explicitly states that it amends the Treasury regulations interpreting the I.R.C. See 69 Fed. Reg. 76,404, 76,404 (Dec. 21, 2004). Nowhere in the Amended Regulation or the Federal Register notice accompanying it is there an indication—implicit or otherwise—that the Secretary of the Treasury intended to interpret the Social Security Act or affect Section 418 agreements.

Moreover, even if the IRS or the SSA *wished* to amend their regulations to affect the scope of student exemptions under States' Section 418 agreements, they lack authority to do so. As this Court recognized in *Bowen*, Congress initially excluded state employees from the Social Security system because of questions regarding its constitutional authority to expand the Social Security system over unwilling States. Though those questions have largely been resolved, the Social Security Act and I.R.C. continue to reflect Congress's sensitivity to state sovereignty. Thus, so long as certain requirements are satisfied, the I.R.C. and the Social Security Act conspicuously honor States' choices about

which coverage groups to include and exclude from Section 418 agreements.

As this Court has recognized, Section 418 "authorizes *voluntary* participation by States in the Social Security System." *Bowen*, 477 U.S. at 45 (emphasis added). The Social Security Act makes clear that, while a State may no longer *withdraw* groups from Social Security coverage, each State alone had authority to determine the scope of public employees' coverage in the first instance. The Social Security Act provides that if a State asks to enter a section 418 agreement, "[t]he Commissioner of Social Security *shall* * * * enter into [such] an agreement." So long as the State's proposal satisfies the minimal requirement of not being "inconsistent with the provisions of this section," "[e]ach such agreement *shall* contain such provisions * * * *as the State may request*." 42 U.S.C. § 418(a)(1) (emphasis added). And, of course, it provides that "[s]uch agreement *shall, if the State requests it*, exclude * * * any agricultural labor, or service performed by a student, designated by the State." *Id.* § 418(c)(5). As the IRS has acknowledged, Section 418 "gives each state the right to decide which coverage groups to include in its" Section 418 agreement. Oppenheimer Memo at 17.

Once a State has entered into (or validly modified) a Section 418 agreement, the State's choices about which coverage groups are to be included and excluded are set, and neither the SSA nor the IRS has the authority to alter the coverage group. To begin with, the statute explicitly indicates that a Section 418 agreement will reflect the choices of the State so long as they are not "inconsistent with the

provisions of this section." 42 U.S.C. § 418(a)(1) (emphasis added). Thus, the State's coverage decisions are to be honored unless inconsistent with the Social Security Act *itself*.

As this Court has observed, "Congress expressly reserved to itself '[t]he right to alter[or] amend * * * any provision of the [Social Security] Act." *Bowen*, 477 U.S. at 44 (quoting 42 U.S.C. § 1304). It is telling that the Social Security Act contains no corresponding provision authorizing any federal agency to make changes by regulation. Cf. *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2288 (2010); *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."). Thus, as the Eighth Circuit concluded in *Apfel*, "the meaning of section 418 agreements cannot be altered through ruling by the * * * [SSA]." 151 F.3d at 747 (internal quotation marks omitted). Rather, "[t]he power to alter the terms of section 418 agreements lies exclusively with Congress."[15] *Ibid.*

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[15] Indeed, it is telling that, nearly six years after the Department of the Treasury issued the Amended Regulation, SSA has not made corresponding changes to its own regulations. Its failure to do so, despite the IRS's recognition of the importance of interpreting the Social Security Act and FICA tax provisions consistently, see *Student FICA Exception*, 69 Fed. Reg. 8604, 8605 (Feb. 24, 2004), suggests SSA understands it lacks authority to do so. Cf. *Meaning of "Temporary" Work under 8 U.S.C. § 1101(a)(15)(H)(ii)(B)*, 32 Op. O.L.C. 1, 5 n.4 (2008), available at http://www.justice.gov/olc/2008/dhs-temp-worker.pdf (noting Department of Labor and Department of Homeland Security amending related regulations simultaneously to conform to one another).

Construing the Social Security Act (or the I.R.C.) to permit administrative action to alter a State's choice of coverage groups would conflict with the congressional deference afforded a State's coverage decisions.

III. The Amended Regulation Is An Unreasonable Interpretation Of I.R.C. § 3121(b)(10)

The Amended Regulation departs from over a half-century of consistent interpretation of the Student Exemption that was, before 2005, applied to *both* the I.R.C. and the Social Security Act, and which the courts have consistently held reflects the "unambiguous" meaning of the statutory language. See *Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 27. The IRS's abrupt departure from that reading is not a reasonable interpretation of the statute. See generally *United States* v. *Correll*, 389 U.S. 299, 305-06 (1967).

When Congress initially excluded students from FICA taxation in 1939, it included two separate exemptions. The original exemption for student employment at a school, college, or university capped the amount an individual could earn while qualifying for the exemption: "Service performed in any calendar quarter in the employ of a school, college, or university * * * [if] the remuneration for such service does not exceed $45 (exclusive of room, board, and tuition)." Social Security Act Amendments of 1939, Pub. L. No. 76-379, ch. 666, § 201, 53 Stat. 1360, 1375 (Social Security Act); *id.* § 606, 53 Stat. at 1385 (I.R.C.). The other, involving tax-exempt organizations, had no cap: "Service performed in any calen-

dar quarter in the employ of any organization [is] exempt from income tax * * * [if] such service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university * * * ." § 201, 53 Stat. at 1374; § 606, 53 Stat. at 1384-85. In setting forth the test for eligibility, the initial regulations referenced "the amount of remuneration * * * in the calendar quarter," consistent with the statutory requirement, but the focus of the regulation was "the character of the organization in whose employ the services are performed * * * and the status of the employee as a student enrolled and regularly attending classes at the school." 20 C.F.R. § 403.821 (1940). The regulation emphasized that "the type of services performed by the employee * * * [is] immaterial." *Ibid.*; accord 26 C.F.R. § 403.221(b) (1944).

When Congress amended the I.R.C. and Social Security Act in 1950, it eliminated the income cap for the student exemption, leaving a single exemption for "[s]ervice performed in the employ of a school, college, or university if such service is performed by a student who is enrolled and is regularly attending classes at such school, college, or university." Social Security Act Amendments of 1950, *supra*, § 104(a), 64 Stat. at 497 (Social Security Act); *id.* § 204(a), 64 Stat. at 531 (I.R.C.). The regulations were amended to conform to the new legislation. The regulations provided:

> For purposes of this section, the type of services performed by the employee, the place where the services are performed, and *the amount of remuneration* for services performed by the em-

> ployee are immaterial; the statutory tests are the character of the organization in the employ of which the services are performed, and the status of the employee as a student enrolled and regularly attending classes * * *.
>
> The status of the employee as a student performing the services shall be determined on the basis of the relationship of such employee with the organization for which the services are performed. An employee who performs services in the employ of a school, college, or university as an incident to and for the purpose of pursuing a course of study at such school, college, or university has the status of a student in the performance of such services.

26 C.F.R. § 31.3306(c)(10)(E)-1(b), (c) (1956) (emphasis added; substructure omitted); accord 20 C.F.R. § 404.1019(b), (c) (1951). The Treasury Regulations remained substantially unchanged until promulgation of the Amended Regulation. See 26 C.F.R. § 31.3121(b)(10)-2(b), (c) (2004). Nearly 60 years later, the Social Security regulations remain substantially identical to those promulgated immediately after enactment of the statutory language. See 20 C.F.R. § 404.1028.

The Amended Regulation's categorical disqualification of student employees who work full time is fundamentally inconsistent with Congress's unambiguous intent. There is a natural and obvious link between remuneration and hours worked. That Congress saw fit to eliminate *any* income cap demonstrates that Congress rejected the idea that the

Student Exemption was to be applicable only to a student's minor, incidental services.[16] See *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993) ("when Congress deletes limiting language, 'it may be presumed that the limitation was not intended'" (quoting *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983)). If Congress had wanted to tie the Student Exemption to income or hours, the earlier versions of the exemption show that Congress knew how to do so.[17] Con-

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[16] There are isolated statements in the legislative history of the 1950 amendments suggesting that certain members of Congress intended that only service "performed for nominal amounts" would come within the exception. See Pet. App. 14a. But as this Court explained last Term, the legislature's purpose and the "manner in which the law 'could have been written,' has no bearing; what matters is the law the Legislature *did* enact." *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1440 (2010) (citation omitted). And what Congress enacted in 1950 was a law that deleted the limit on remuneration. See generally *Univ. of Chi. Hosps.* v. *United States*, No. 05-C-5120, 2006 WL 2631974, at *3 (N.D. Ill. Sept. 8, 2006) (rejecting reliance on statements in 1950 legislative history), aff'd, 545 F.3d 564 (7th Cir. 2008).

[17] See, *e.g.*, *Hardt* v. *Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010) ("Because Congress failed to include in [29 U.S.C.] § 1132(g)(1) an express 'prevailing party' limit on the availability of attorney's fees [as it did in § 1132(g)(2)], the Court of Appeals' decision adding that term of art to a fee-shifting statute from which it is conspicuously absent more closely resembles 'invent[ing] a statute rather than interpret[ing] one.'" (alteration in original) (quoting *Pasquantino* v. *United States*, 544 U.S. 349, 359 (2005))); *Whitfield* v. *United States*, 543 U.S. 209, 216-17 (2005) ("Where Congress has chosen *not* to [include certain language], we will not override that choice based on vague and ambiguous signals from legislative history.") (citation omitted).

gress's meaning was quite apparent to both agencies implementing the legislative change; they stated that "the amount of remuneration" was "*immaterial*," emphasized that the *only* relevant factors were "the character of the organization" as a school, college, or university and "the status of the employee as a student," and explained the exemption was available to any student who worked "as an incident to and for the purpose of pursuing a course of study." 20 C.F.R. § 404.1019(b), (c) (1951); 26 C.F.R. § 31.3306(c)(10)(E)-1(b), (c) (1956). Cf. *Nat'l Muffler Dealers Ass'n, Inc.* v. *United States*, 440 U.S. 472, 477 (1979) ("A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent."); *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 515 (1994) ("an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view").

Neither Congress nor the agencies disturbed these regulations for a half-century, despite numerous amendments to I.R.C. § 3121(b) and the Social Security Act. And not once has Congress made a change that suggests any doubt about the validity of those longstanding administrative interpretations. Cf. *Cottage Savings Ass'n* v. *Comm'r*, 499 U.S. 554, 561 (1991) ("Treasury regulations * * * long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and

have the effect of law.") (quoting *Correll*, 389 U.S. at 305-06).

Indeed, if anything, Congress has taken affirmative steps showing its approval of the Social Security regulations' definition of student—and in particular, their application to medical residents. As noted above, only months after the Eight Circuit held in *Apfel* that the University of Minnesota's medical residents were "students" under the SSA regulations and the State's Section 418 agreement, Congress enacted legislation permitting States to amend their Section 418 agreements to exclude "service performed in the employ of a school, college, or university if such service is performed by a student who is enrolled and is regularly attending classes at such school, college, or university." See § 2023(a), 112 Stat. at 2681-904. This enactment suggests that Congress agreed with the understanding of the student exemption reflected in both *Apfel* and the SSA regulations. See, *e.g.*, *Dabit*, 547 U.S. at 85 86.

IV. Medicare Reimbursement Programs Reflect Congress's Acknowledgement that Residents Are Students

Other areas of law confirm that medical residents are principally engaging in educational activities and thus properly classified as students. For example, "Medicare, the federal health care program for elderly and certain disabled people, subsidizes training for medical school graduates [i.e., residents] in hospitals and other teaching institutions by helping to support the increased costs associated with postgraduate medical training." U.S. Gov't Accountabil-

ity Office, *supra* note 14, at 1. "Training resident physicians involves significant costs beyond those customarily associated with patent care," because, in addition to the fact that "the involvement of trainees in care reduces the overall efficiency of hospital operations," residency programs "must pay for faculty, faculty offices, classroom space, comprehensive medical libraries, and advanced, highly sophisticated technological equipment to support their residency programs." Am. Hosp. Ass'n, *Teaching Hospitals: Their Impact on Patients and the Future Health Care Workforce* 3 (Sept. 2009), available at www.aha.org/aha/trendwatch/2009/twsept2009teaching.pdf.

To help offset those costs, "[t]he federal government invests significantly in medical education" by making graduate medical education payments "to help ensure that the anticipated supply of new physicians meets the nation's health care needs." U.S. Gov't Accountability Office, *supra* note 14, at 1. These payments include direct and indirect Medicare graduate medical education ("GME") payments. "Direct payments are provided to teaching institutions for costs directly related to medical training, such as teachers' salaries and administrative costs." *Id.* at 1 n.1; accord Texas Higher Educ. Coordinating Bd., *Funding Graduate Medical Education in Texas* 1 (Aug. 23, 2004), available at http://www.thecb.state.tx.us/reports/pdf/0778.pdf. Indirect payments are provided in recognition of the increased costs because of "'the additional tests and procedures ordered by residents as well as the extra demands placed on other staff as they participate in the edu-

cational process.'" *St. Mary's Hosp.* v. *Leavitt*, 416 F.3d 906, 909 (8th Cir. 2005) (quoting H.R. Rep. No. 98-25, at 140 (1983), reprinted in 1983 U.S.C.C.A.N. 219, 359).

The fact that the Medicare system makes "graduate medical education" payments confirms Congress's judgment that residency programs perform a necessary *educational* function and are designed to produce an adequate supply of doctors, and do not simply represent on-the-job training for staff physicians. That conclusion is underscored by the rules governing Medicare reimbursements, which clearly indicate that supervising faculty are present in an *educational* capacity, repeatedly referring to them as "teaching physician[s]," "teaching surgeon[s]," and "teaching anesthesiologist[s]." Centers for Medicare & Medicaid Servs., Dep't of Health & Human Servs., No. 100-04, *Medicare Claims Processing Manual*, ch. 12 (Mar. 12, 2010), available at http://www.cms.gov/manuals/downloads/clm104c12.pdf. Those rules make clear that residents are not primarily present as caregivers in their own right, but because they are students being educated. The rules state that, with very limited exceptions, see *id.* § 100.1.1.C, Medicare reimbursement is *only* permissible when care is "[p]ersonally furnished by a physician who is not a resident," or "[f]urnished by a resident where a teaching physician was physically present during the critical or key portions of the service," *id.* § 100.1, even for "[m]inor [p]rocedures." *Id.* § 100.1.2.A.3. The teaching physician's involvement must be carefully documented. *Id.* § 100.1.1. The structure of the payments makes clear they are tailored to offset the

costs of educating residents, rather than for residents' provision of patient-care services. The existence of these funding mechanisms is further evidence that residency programs are principally designed to educate physicians, and the residents involved are properly regarded as students.[18]

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[18] One IRS memorandum asserts in passing that the Medicare GME reimbursement program supports taxation of residents' salaries because "implicit in Medicare's reimbursement of GME costs is Congress' belief that GME enhances the quality of patient care in a teaching hospital." See Memorandum from Mary Oppenheimer, Assistant Chief Counsel, to Steven T. Miller, Director, Exempt Organizations, IRS 9 (Aug. 23, 2001), available at http://www.ama-assn.org/ama/upload/mm/16/irsficamemo.pdf. It concludes that residency programs are disqualified because they "improve the quality of health in the United States by ensuring and improving the quality of graduate medical education experience for physicians in training." *Id.* at 10 (internal quotation marks omitted). But that analysis focuses inappropriately on the beneficial *effects* of residency programs rather than their educational purpose, as required by the regulations. See *supra*, at 32.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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